No. 91-111

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In The

Supreme Court of the United States

October Term, 1991

BERNARDSVILLE QUARRY, INC.,

Petitioner,

vs.

BOROUGH OF BERNARDSVILLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. May a United States District Court deprive a plaintiff of the right recognized in *England v. Louisiana State Bd. of Medical Examiners,* 375 U.S. 411 (1964), to have federal constitutional claims tried by a federal court by refusing to abstain, requiring plaintiff to submit its federal claims to a state court or be precluded by *res judicata* under the Full Faith and Credit Clause of the United States Constitution?

2. Where plaintiff's state court action was reached first for trial, the district court had in effect "abstained," and plaintiff had advised the district court and the state court that it was reserving its federal constitutional claims for trial in a federal court, were plaintiff's federal constitutional claims precluded by *res judicata*?

LIST OF PARTIES

The parties listed in the caption are the parties to the proceedings below. John Doe and Richard Roe were voluntarily dismissed prior to the entry of the summary judgment by the United States District Court for the District of New Jersey.

There are no parent companies or subsidiaries of petitioner Bernardsville Quarry, Inc.

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vs.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Bernardsville Quarry, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceeding on March 8, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 929 F.2d 927 (3d Cir. 1991) and is reprinted in the

Appendix hereto, p. 1a, *infra.*

The memorandum decision of the United States District Court for the District of New Jersey (Brown, D.J.) has not been reported. It is reprinted in the Appendix hereto, p. 8a, *infra.*

STATEMENT OF JURISDICTION

The United States District Court for the District of New Jersey had jurisdiction pursuant to 28 U.S.C. § 1331(a) inasmuch as the complaint alleged a taking of the petitioner's property without due process and without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. The district court entered summary judgment dismissing the petitioner's complaint on August 14, 1990.

On petitioner's appeal to the Court of Appeals for the Third Circuit, the Third Circuit affirmed the decision of the district court on March 8, 1991. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES, COURT RULES AND ORDINANCE INVOLVED

a. 28 U.S.C. § 1331. *Federal question.*

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

b. 28 U.S.C. § 1738. *State and Territorial statutes and judicial proceedings; full faith and credit.*

> [. . .] Such Acts, records and judicial

proceedings [of any State, Territory or Possession of the United States] or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

c. New Jersey Court Rule 4:27-1. *Joinder of Claims.*

(2) Mandatory Joinder. Each party to an action shall assert therein all claims which he may have against any other party thereto insofar as may be required by application of the entire controversy doctrine.

d. New Jersey Court Rule 4:5-1. *Pleadings Allowed; Notice of Other Actions.*

[. . .] Each party shall include with the first pleading a certification as to whether the matter in controversy is the subject of any other action pending in any court or of a pending arbitration proceeding, or whether any other action or arbitration proceeding is contemplated; and, if so, the certification shall identify such actions and all parties thereto. Further, each party shall disclose in the certification the names of any other party who should be joined in the action. [. . .]

e. Section 9(e) of Ordinance No. 770 of the Borough of Bernardsville entitled "An Ordinance to License and Regulate the Business of Quarrying in the Borough of Bernardsville and Providing

Penalties for the Violation Thereof:"

9. *Regulation of Operation.*

e. No quarrying shall be permitted which will reduce the quarried area below the lowest grade of adjoining properties, roads, or railroad line; nor shall any quarrying be permitted which will endanger the lateral support of abutting properties. [. . .]

STATEMENT OF THE CASE

Petitioner Bernardsville Quarry, Inc. ("BQI") is a New Jersey corporation which owns and operates the Bernardsville Quarry on a one hundred and ten acre tract in the Borough of Bernardsville. The property has been operated as a quarry for most of this century. BQI acquired title to the property for $3,825,000 on March 1, 1987 as the successful bidder at a sheriff's sale. The quarry property was particularly attractive to bidders because of its substantial reserves of high-quality basalt/trap rock, a material that meets the strictest of construction standards.

Following its purchase, BQI spent $1,500,000 to clean up demolition materials and other waste that had been dumped on the property under the prior ownership, and substantial amounts to repair and replace the on-site bituminous concrete plant and other plant and equipment. It simultaneously spent countless hours and thousands of dollars responding to the Borough's requests for information in connection with certificate of occupancy and permit applications.

On July 20, 1987, while BQI's applications were pending, the Borough Council adopted a Quarry License Ordinance (the "Ordinance") prohibiting quarrying below the lowest grade of

adjoining properties. The lowest grades of properties adjoining the Quarry are at elevations ranging from 500 feet to 350 feet. Because the property has been operated as a quarry continuously for most of this century, below-grade quarrying had occurred on the property for many years prior to enactment of the Ordinance. Specifically, a seventeen acre portion of the quarry had been excavated to elevation 225 feet prior to the acquisition by BQI. Substantially all of the remaining valuable basalt reserves lie below elevation 350. Thus, the effect of the Ordinance is to deprive BQI, by mere adoption of the Ordinance, of the 11,000,000 tons of basalt reserves lying below elevation 350 with an estimated value of $63,000,000.

BQI filed a quarry license application with the Borough on February 29, 1988, supported by voluminous expert reports. An asbestos clean-up plan and a reclamation plan were submitted. BQI's application was submitted with the expectation that the Borough would modify its prohibition on below-grade quarrying in view of the reclamation plan proposed. BQI received no response from the Borough on its application until April 11, 1988 when the application was denied.

On May 25, 1988, BQI instituted a civil action in lieu of prerogative writ in the Superior Court of New Jersey against the Borough challenging the validity of the Ordinance, the denial of a quarry license and a continuing certificate of occupancy. The complaint also alleged violations of petitioner's rights under the New Jersey Constitution and New Jersey law. With the exception of a § 1983 claim based on the state law claims, no claims of violations of federal law were asserted.

On May 28, 1988, BQI filed this civil action in the United States District Court limited solely to the claim that the Ordinance deprived it of its property without due process of law and without just compensation in violation of the Fifth and Fourteenth

Amendments. It also sought damages under 42 U.S.C. § 1983. No claims of violations of state law were asserted. The parties agreed that discovery in the state court action would also be deemed taken in the federal action.

On November 8, 1988, the Borough moved in the federal action for "abstention, stay or other appropriate relief and administrative dismissal of the matter pending the resolution of the parallel state action." In the course of oral argument, counsel for the Borough said:

> Accordingly, your Honor, it makes abundance (sic) sense in this particular case to try the case in the state court, and for the federal court to abstain. In the event that at some point in time it's determined that not all the federal questions have been adequately, or sufficiently resolved, in the state court action, then the federal court has the option at that point in time to turn around and say, okay, well, we'll pick up where the state court left off, for whatever it left out.

In colloquy with counsel, the district court judge indicated an inclination to stay the federal action for a limited period of time and then set up a status conference with the court. Counsel for BQI advised the court orally and in its brief in opposition to abstention that it reserved the federal constitutional issues for trial in the federal court. The district court then decided that rather than abstain, it would adjourn the pretrial until discovery was completed, with a status conference on April 17, 1989.

The trial of the state court action commenced on April 18, 1989, and continued for thirty-six days. As a result, the federal case was stayed pending resolution of the state case. The state court issued its decision on October 5, 1989. A motion to correct

the record and for reconsideration was denied. A final judgment was entered on January 8, 1990. On February 21, 1990, BQI filed a notice of appeal to the Appellate Division of the New Jersey Superior Court.

In connection with proceedings to determine the form of the final judgment in the state court action, the Borough included a provision stating that the depth limitation in the challenged Ordinance was not an unlawful deprivation of BQI's property without due process and without just compensation under the laws of both the State of New Jersey *and the United States.* Counsel for BQI objected on the ground that "plaintiff had studiously avoided asserting its rights under the United States Constitution in this litigation." The trial court agreed and struck the words "and the United States" from the final judgment. Thus, the state court was fully aware that the federal constitutional claims had been asserted in the United States District Court and had not been submitted to it for adjudication.

On March 12, 1990, the Borough moved to dismiss the complaint in the federal action. The Borough argued that all of BQI's claims had or should have been litigated in the state court action and were, therefore, barred by the entire controversy doctrine. The district court granted the motion to dismiss and filed an order on August 14, 1990. The Third Circuit affirmed the order of dismissal on March 8, 1991 based on an application of New Jersey's entire controversy doctrine.

REASONS FOR GRANTING THE WRIT

The district court and the Third Circuit have decided a federal question in a way that conflicts with applicable decisions of the Supreme Court and of the Third Circuit itself. BQI was led to believe that it had reserved its federal constitutional claims for trial in a federal court and, accordingly, did not plead them or

try them in the state court action only to be told at the conclusion of the state court action (a) that it could not return to the federal court and (b) that its federal constitutional claims were precluded by the entire controversy doctrine. Thus, BQI has been compelled, without its consent and through no fault of its own, to accept a state court's determination of its federal constitutional claims in violation of the principle of *England v. Louisiana State Bd. of Med. Examiners, supra,* 375 U.S. 411. This was accomplished, in the opinion of the Third Circuit, by the district court's decision not to abstain.

The Third Circuit's unduly narrow focus on the presence or absence of a formal abstention ignores the fact of the *de facto* abstention by the district court when it stayed the federal action pending completion of the parallel state action involving independent state claims. It also ignores the clear understanding of the parties and the courts as to the basis on which the respective actions were to proceed. BQI reasonably understood that the adjournment of the case management conference and the stay of the federal action constituted the required "abstention" which was a condition to its reservation of its federal constitutional claims. If a "formal" abstention were required, then the district court could and, according to the Third Circuit, did deprive BQI of its constitutional right to have its federal constitutional claims tried by a federal court — with no valid reason.

The United States Constitution provides that the judicial power of the United States is vested in one Supreme Court and in such inferior courts as the Congress may from time to time establish. Article III, § 1. The Congress has established the federal district courts and granted them jurisdiction over claims arising under the United States Constitution. 28 U.S.C. § 1331(a). Once BQI exercised the right granted by Congress to invoke federal jurisdiction, the federal court was bound to take the case and proceed to judgment. It could not abdicate its authority or duty

in favor of the state jurisdiction. *Cohens v. Commonwealth of Virginia,* 19 U.S. 264, 6 Wheat. 264 (1821); *Kline v. Burke Construction Co.,* 160 U.S. 226, 234 (1922).

Where concurrent jurisdiction exists, a plaintiff is free to bring suit in both the state and federal forums for the same cause of action. *Vendo Co. v. Lektro-Vend Corp.,* 433 U.S. 623, 642 (1977), *reh. denied,* 434 U.S. 881 (1977). As the Supreme Court noted in *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281 (1970), a case in which parallel state and federal actions were pending:

> Although the federal court did have jurisdiction of the railroad's complaint based on federal law, the state court also had jurisdiction over the complaint based on state law and the union's asserted federal defense as well. While the railroad could probably have based its federal case on the pendent state law claims as well, it was free to refrain from doing so and leave the state law questions and the related issue concerning preclusion of the state remedies by federal law to the state courts. Conversely, although it could have tendered its federal claims to the state court, it was also free to restrict the state complaint to state grounds alone. In short the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts.

398 U.S. at 295-96 (citations omitted). Thus, as even the Third Circuit acknowledged below, the filing by BQI in both state and federal courts was both historically correct and authorized. Moreover, it was a practical necessity. Upon the denial of its quarry license application, BQI had forty-five days within which to

challenge the validity of the ordinance and the denial of its application. Clearly it had the right to challenge the validity of the ordinance in federal court on federal constitutional grounds. Its challenge to the denial of its license application and other conduct of the Borough officials was based on state law, however. Were BQI to have brought suit only in federal court, its state law claims would have been pendent to its federal claims. In the event the federal court were to dismiss the federal constitutional claims, BQI may have been deprived of the right to then pursue its state law claims in state court by the running of the forty-five day statute of limitations. Thus, BQI had no choice but to file parallel actions in state and federal court.

A corollary to the right simultaneously to pursue state and federal suits on the same cause of action is the right to reserve federal claims for adjudication in the federal court. This right, expressly confirmed by the Supreme Court in *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, supra,* was established by the Supreme Court in *England.* In that case, plaintiffs who had been relegated to state court for determination of state law issues were recognized to have a right to return to federal court for a trial on their federal constitutional claims once the state action was completed.

In reaching its decision in *England,* this Court held that a litigant "who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can[not] be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." 375 U.S. at 415. Thus, where a party is simultaneously in state and federal court, he need not litigate his federal claims in state court. 375 U.S. at 420. Rather, he may reserve his federal claims for adjudication by a federal district court provided he makes it clear that "he is exposing his federal claims [in the state courts] only for the purpose of complying with Windsor, and

that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions." 375 U.S. at 421. Only if a party "freely and without reservation" proceeds to litigate his federal claims in state court will he be precluded from litigating those claims in federal court. 375 U.S. at 420.

In addition, the Court pointed out that the doctrine of abstention does not contemplate the abdication of federal jurisdiction, but only the postponement of its exercise. The Court recognized that appeal from the state court to the Supreme Court is theoretically available by direct appeal, or by discretionary grant of certiorari, but:

> . . . is an inadequate substitute for the initial District Court determination — often by three judges, 28 U.S.C. § 2281 — to which the litigant is entitled in the federal courts. This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims.

375 U.S. at 416. The *England* Court then ruled that when a reservation has been made, a litigant's right to return to federal court "will in all events be preserved." 375 U.S. at 421.

In affirming the district court's dismissal of the federal action, the Third Circuit found that BQI had sought similar relief in both actions. This finding is erroneous. BQI's state court complaint was carefully limited to the violation of BQI's rights under the state constitution. Only the fifth count of the complaint asserted that the denial of BQI's *quarry license application* violated BQI's

state and federal constitutional rights. By contrast, the federal court complaint was limited to alleging that the *limitation on the depth of excavation* deprived BQI of its property, without just compensation in violation of the Fifth and Fourteenth Amendments. A claim under 42 U.S.C. § 1983 was asserted based on the federal constitutional claim. Thus, the respective complaints were tailored to reserving the federal claims for federal court.

And both actions proceeded on the apparent understanding and agreement of the parties and the state and federal courts that the federal claims would be tried in federal court. On the Borough's motion for abstention, counsel for the Borough agreed that if all federal questions were not resolved in the state court action, BQI could return to federal court for adjudication of those claims. Likewise, on that same motion, BQI informed the district court that it was reserving its federal claims for adjudication by the district court. The district court declined to abstain at that point. Yet when the state court action was reached, the district court stayed the federal action — a *de facto* abstention — pending completion of the state case. The parties went to state court, therefore, fully expecting to be back in federal court at the conclusion of the state case to try the federal claims not asserted in the state court action.

Similarly, in the state court action, neither the parties nor the court understood that BQI's federal claims had been submitted for adjudication. Although the Third Circuit found that the state court had not been informed that BQI was reserving its federal claims for federal court, that is not the case. The state court had before it a complaint pleading only violations of state law. It had before it a certification by BQI's counsel pursuant to R. 4:5-1 that BQI had filed suit in the federal district court against the Borough arising out of the same controversy alleging a violation of its rights under the United States Constitution. Clearly, the state court appreciated the reservation of the federal rights for

it limited its final judgment to state law claims and struck from the Borough's proposed form of judgment any reference to an adjudication of federal claims.

Notwithstanding the foregoing, the Third Circuit held that *England* did not apply for two reasons: first, *England* requires an abstention, and there had been no abstention; and second, even if there had been an abstention, BQI did not properly reserve its federal claims. Instead, the Third Circuit found, "BQI unreservedly litigated its federal claims in state court and thereby elected to forego its right to return to federal court." Not only are these findings factually incorrect, they simply elevate form over substance.

This Court has never expressly ruled that abstention is a prerequisite to application of the *England* doctrine. And the Third Circuit itself has accepted that it is not. *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1071 (3d Cir. 1990). *Cf.*, *Roy v. Jones*, 484 F.2d 96, 101-03 (3d Cir. 1978) (Aldisert, C.J. concurring). But even assuming that abstention is a prerequisite to application of the *England* doctrine, the actions of the district court in this case were tantamount to an abstention. While the district court did not enter an abstention order in January of 1989, it did, given its stated inclination to stay the case pending the outcome of the state action, put the federal case on a slower track. Then, only two and one-half months later, with no further proceedings having taken place in the federal action, it actually stayed the federal action when the state action was reached for trial. Inasmuch as a district court, upon abstention, stays the federal action and retains jurisdiction pending the proceedings in the state court, *American Trial Lawyers Ass'n v. New Jersey Supreme Court*, 409 U.S. 467, 469 (1973); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 512-13 (1972), the district court's April stay order was absolutely no different in effect than would have been an abstention order in January. *See Bradley v.*

Pittsburgh Bd. of Educ., supra, 913 F.2d at 1071-72. Surely, where important federal rights are concerned, a litigant's opportunity to pursue its claims in the forum it has chosen should hinge not on the words a district court uses but on the substance and effect of the orders it enters. Thus, the Third Circuit erred in ruling that there had been no district court action of a type to trigger application of *England*.

Moreover, the Third Circuit was simply wrong when it found that "BQI failed to inform the state court that it wished to pursue its federal claims in federal court." Under *England*, "an explicit reservation is not indispensable." *England v. Louisiana State Bd. of Med. Examiners, supra,* 395 U.S. at 421. Rather, what *England* requires is not that a party file something formal in the nature of a pleading with the state court but simply that the state court and the parties understand that the plaintiff's federal claims have not been submitted to the state court for adjudication. What better proof can there be that the state court understood BQI to have reserved its federal claims when, with knowledge of the pending federal action, the state court refused to rule on the federal claims and struck from its final judgment any reference to its having adjudicated the federal claims?

Rather than apply the principles of *England*, the district court and the Third Circuit chose to dispose of BQI's federal action on the basis of the Supreme Court's decision in *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984) (hereafter "*Migra*"). *Migra*, however, neither overruled *England* nor required dismissal of BQI's federal case. In fact, *Migra* clearly validates BQI's position that it is now entitled to pursue its federal constitutional claims in federal court, to wit:

> In the event that a § 1983 plaintiff's federal and state-law claims are sufficiently intertwined that the federal court abstains from passing on the

> federal claims without first allowing the state court to address the state law issues, the plaintiff can preserve his right to a federal forum for his federal claims by informing the state court of his intention to return to federal court on his federal claims following litigation of his state claims in state court. See, e.g., *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 11 L.Ed.2d 440, 84 S.Ct. 461 (1964).

465 U.S. at 85 n.7.

In *Migra,* the plaintiff first litigated her state claims of breach of contract and tortious interference to judgment in state court and voluntarily dismissed her "conspiracy" claims. She then filed suit in the federal court for violation of her federal constitutional rights under the First and Fourteenth Amendments. The Supreme Court in *Migra* did no more than hold that 28 U.S.C. § 1738 requires federal courts to give full faith and credit and the same claim preclusive effect to a state adjudication as would the courts of the state. It then examined Ohio case law to determine what constituted a "claim" under Ohio law, and found it could not determine what Ohio law had been applied by the district court and remanded for that purpose.

In the case *sub judice* the district court and Third Circuit followed the apparent direction of *Migra*, but failed to distinguish the disparate postures of the plaintiffs in the two cases. In *Migra*, the plaintiff, unlike BQI, litigated her case to conclusion in the state court before commencing her federal action. In that case, no reservation of federal questions was made and the plaintiff was properly deemed to have chosen the state forum over the federal forum.

The operative words in 28 U.S.C. § 1738 are that the judicial

proceedings shall have the same full faith and credit "as they have by law or usage in the courts of such state. [. . .]" The question projected is whether a plaintiff who had asserted its federal constitutional claims in a federal court would be precluded from asserting its state constitutional claims in New Jersey state court.

The entire controversy doctrine embodied in the New Jersey Court Rules requires that a person assert in one action all related claims against a particular adversary or be precluded from bringing a second action based on omitted claims against that party. *Falcone v. Middlesex County Med. Society,* 47 N.J. 92, 93 (1966); *William Blanchard Co. v. Beach Concrete Co.,* 150 N.J. Super. 277, 292-93 (App. Div.), *certif. denied,* 75 N.J. 528 (1977). The rule is designed to "eliminate delay, prevent harassment of a party and unnecessary clogging of the judicial system, avoid wasting the time and effort of the parties and promote fundamental fairness." *Aetna Ins. Co. v. Gilchrist Brothers, Inc.,* 85 N.J. 550, 556 (1981).

But the entire controversy doctrine has its limits. As noted in the *Restatement (Second) of Judgments* § 26 (1982):

> (1) When any of the following circumstances exists, the general rule [prohibiting the splitting of claims] does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:
>
> (a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; or
>
> (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action, [. . .]

New Jersey, to whose law this Court must look, *Migra v. Warren City School Dist. Bd. of Educ., supra,* 465 U.S. at 84, specifically follows the *Restatement (Second) of Judgments. See, e.g., Brown v. Brown,* 208 N.J. Super. 372, 384 (App. Div. 1986); *Gareeb v. Weinstein,* 161 N.J. Super. 1, 10 (App. Div. 1978); *Devlin v. Johns-Manville Corp.,* 202 N.J. Super. 556, 569 (Law Div. 1985).

The Third Circuit itself, as it has in other cases, recognized below that *England* creates an exception to the entire controversy doctrine when it stated:

> Of course, if the district court had abstained, BQI could have avoided the effect of the Entire Controversy Doctrine by informing the state court of its intention to return to federal court to litigate its federal claims.

See also, Bradley v. Pittsburgh Bd. of Educ., supra, 913 F.2d at 1071; *Kovats v. Rutgers,* 749 F.2d 1041, 1048 (3d Cir. 1984). This is the exception embraced by subsection (1)(b) of Section 26 of the *Restatement.* As argued previously, BQI contends that it made the reservation of rights required by *England* and, therefore, its case fits squarely with the subsection (1)(b) exception.

BQI submits that not only does subsection (1)(b) except it from the operation of the entire controversy doctrine, subsection (1)(a) does as well. Courts applying New Jersey law have held that a party may waive the benefit of the entire controversy doctrine by acquiescing — either by word or conduct — to a plaintiff's splitting of its claims. *See, e.g., Bradley v. Pittsburgh Bd. of Educ., supra,* 913 F.2d at 1072-73; *Brown v. Brown, supra,* 208 N.J. Super. at 384. The Third Circuit in *Bradley* went so far as to suggest that state and federal tribunals may acquiesce in the claim splitting thereby preventing operation of the entire controversy doctrine. That is precisely what happened in this case.

To a person, everyone connected with these dual actions proceeded with the knowledge that BQI intended to try its state claims in state court and its federal claims in federal court. Although the Borough raised stock defenses in its answer in the federal action, including the pendency of the state action, it vigorously participated in both actions and made no motions to dismiss the federal action during the pendency of the state action. In fact, it was the Borough that moved the federal court to abstain and stay the federal action pending the outcome of the state action. In the context of that motion, counsel for the Borough expressly agreed that if the state court did not adequately address BQI's federal questions, the parties could come back to federal court to "pick up where the state court left off, for whatever it left out." If such words and actions do not constitute "acquiescence" within the meaning of the *Restatement*, nothing does.

It was not until the state action had been concluded and the form of final judgment submitted that the Borough asserted that BQI's federal claims had been decided by the state court. Its proposed form of judgment incorporated such a finding. When BQI objected to inclusion of its federal claims, the state court agreed that the federal claims had not been submitted to it for adjudication and refused to rule on the claims. Given the posture in which the state action was tried and adjudicated and the position which the Borough took in the federal action, BQI had every right to expect that it could return to federal court to try its federal claims. Thus, the Third Circuit erred in barring the action on the basis of New Jersey's entire controversy doctrine.

Likewise, the Third Circuit erred when it found that BQI had litigated its federal claims in state court, suggesting that, apart from the entire controversy doctrine, principles of *res judicata* would bar relitigation in federal court. Under the doctrine of *res judicata*, a party is barred from relitigating a cause of action that was previously fairly litigated and finally determined. *City of*

Plainfield v. Public Service Elec. & Gas Co., 82 N.J. 245, 257-59 (1980); *T.W. v. A.W.*, 224 N.J. Super. 675, 682 (App. Div. 1988) Application of the doctrine requires a final judgment by a court of competent jurisdiction, and identity of issues, parties, and cause of action. *City of Hackensack v. Winner,* 162 N.J. Super. 1, 27-28 (App. Div. 1978), *mod.*, 82 N.J. 1 (1980). The somewhat narrower doctrine of collateral estoppel bars relitigation of any issue of fact actually determined in a prior action. *State v. Gonzalez,* 75 N.J. 181, 186 (1977); *Warren Tp. v Suffness,* 225 N.J. Super. 399, 408 (App. Div.), *certif. denied,* 113 N.J. 640 (1988); *Charlie Brown of Chatham, Inc. v. Board of Adj. for Chatham Tp.*, 202 N.J. Super. 312, 327 (App. Div. 1985). But relitigation of issues is precluded in subsequent actions "only when they have been 'distinctly put in issue,' 'actually litigated' and 'directly determined' by a prior final judgment." *Matter of 1982 Final Reconciliation Adjustment for Jersey Shore Medical Ctr.*, 209 N.J. Super. 79, 92 (App. Div. 1986).

Neither doctrine applies to preclude relitigation of BQI's taking issue in federal court because the federal taking issue was not raised, litigated and adjudicated in state court nor was it the subject of a final judgment in state court. The Borough will no doubt argue that since the New Jersey and federal constitutional standards are similar BQI will only lose in federal court, having lost on the taking issue in state court. The state trial court's decision on the state taking issue is not determinative of BQI's federal taking issue, however, for as one district court judge has aptly noted:

> Defendants' argument that the state and federal questions are "mirrors," involving the same standards, does not deprive plaintiffs of their right to a federal forum. The fact that the state constitution may be construed in identical or similar ways does not transform federal

constitutional issues into state law issues.

Bally Mfg. Corp. v. Casino Control Comm'n of N.J., 534 F. Supp. 1213, 1217 (D.N.J. 1982). Indeed, the treatment of the taking issue in the federal courts is sufficiently different from the state treatment to require a federal court's adjudication of BQI's federal questions.

It is beyond question that a municipality, in the exercise of its police power, may adopt reasonable restrictions on the use of private property. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 125-26 (1978), *reh. denied*, 439 U.S. 883 (1978). Under New Jersey law, a presumption of reasonableness attends municipal regulation and a plaintiff must overcome the presumption by clear and compelling evidence demonstrating its unreasonableness. *Dock Watch Hollow Quarry Pit, Inc. v. Township of Warren*, 142 N.J. Super. 103, 116 (App. Div. 1976), *aff'd*, 74 N.J. 312 (1977). New Jersey courts have allowed this presumption to exert a confiscatory impact upon the rights of private property owners by, for example, denying a property owner a right of inverse condemnation unless deprived of "all or substantially all of the beneficial use of the totality of his property as the result of excessive police power regulation." *Orleans Builders & Developers v. Byrne*, 186 N.J. Super. 432, 446 (App. Div. 1982), *citing AMG Associates v. Springfield Tp.*, 65 N.J. 101 (1974); *Matter of Loveladies Harbor, Inc.*, 176 N.J. Super. 69 (App. Div. 1980), *certif. denied*, 85 N.J. 501 (1981); *American Dredging Co. v. State*, 169 N.J. Super. 18 (App. Div. 1979).

This presumption of reasonableness is certainly not foreign to federal jurisprudence. However, federal courts conduct a much more probing examination of the extent of the injury caused by municipal regulation. While virtually nothing short of confiscation will result in a finding of taking at the state level, federal courts

readily scrutinize the economic impact of the regulation on the claimant and the extent to which it has interfered with distinct investment-backed expectations. *See, e.g., MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 349 (1986), *reh. denied,* 478 U.S. 1035 (1986); *Connolly v. Pension Benefit Guaranty Corp.,* 475 U.S. 211 (1986), *reh. denied,* 478 U.S. 1035 (1986); *Kirby Forest Indus. Inc. v. United States,* 467 U.S. 1, 14 (1984).

Thus, while the government may adopt regulations that adversely affect the value of property, *Penn Central Transp. Co. v. City of New York, supra,* 438 U.S. at 124, a taking for federal constitutional purposes occurs if an ordinance regulating the use that can be made of a particular property denies the owner economically viable use of his land. *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 295-96 (1981). *Cf. United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 126-27 (1985). In such cases, the essential inquiry is how severe the impact of the regulation is on the property owner's parcel. *Penn Central Transp. Co. v. City of New York, supra,* 438 U.S. at 136. And in assessing the severity, the Supreme Court compares the value that has been taken from the property by virtue of the regulation with the value that remains in the property. *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470 (1987); *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594 (1962).

In this case, the state court found no taking of BQI's property despite specific findings (a) that BQI was, by virtue of the Ordinance, prohibited from removing 11,000,000 tons of basalt reserves and (b) that BQI had little likelihood of recovering its investment of $9,000,000. This finding was based, in large part, on the state court's ready acceptance of the "known hazards and dangers" inherent in quarrying referred to in *Dock Watch Hollow Quarry Pit, Inc. v. Township of Warren, supra,* 142 N.J. Super. 103 (one of New Jersey's only quarry cases), without application to the facts of the BQI case. This approach is clearly at odds

with the federal approach on mining issues.

Federal courts have found the prohibition of the mining of existing mineral reserves to be a taking requiring just compensation. *Whitney Benefits, Inc. v. United States,* 752 F.2d 1554 (Fed. Cir. 1985); *Skaw v. United States,* 740 F.2d 932 (Fed. Cir. 1984); *Yuba Goldfields, Inc. v. United States,* 723 F.2d 884 (Fed. Cir. 1983). They expressly or impliedly recognize the right to mineral reserves is a property right protected by the Fifth and Fourteenth Amendments and weigh the severity of the impact on the owner against the danger sought to be alleviated. This Court itself, in *Keystone Bituminous Coal Ass'n v. DeBenedictis, supra,* 480 U.S. 470, although ruling that a requirement that an operator leave less than 2% of its coal in place to prevent subsidence did not result in a taking, acknowledged that its decision would have been different had the statute made it commercially impracticable for property owners to continue to mine on their properties. That holding was consistent with this Court's observation in *Goldblatt v. Hempstead, supra,* 369 U.S. 590, that a use restriction may constitute a taking if it has an unduly harsh impact on the owner's use of property. Although the mining restriction in *Goldblatt* was upheld, it was clear that the holding was premised on the Court's assumption that the ordinance did not prevent the owner's reasonable use of the property because the owner made no showing of an adverse effect on the value of the land.

As the *Dock Watch* case illustrates, New Jersey courts are quick to label quarrying a public nuisance and to find a public purpose in its elimination despite the economic devastation it visits on a quarry owner. This is not the case at the federal level where the consideration of the harshness of mining regulations pervades even those cases upholding mining regulations based on the specific facts presented. This consideration is poignantly revealed in Chief Justice Rehnquist's dissent in the *Keystone Bituminous Coal Ass'n* case in which three other Justices joined. Although recognizing

that the state was acting to promote a public purpose, Chief Justice Rehnquist argued that the existence of a public purpose was merely a necessary prerequisite to the state's exercise of its taking power but did not excuse the state from paying just compensation for destroying a property right in the public interest. 480 U.S. at 511. On the issue of public purpose, the Chief Justice found the majority had too blithely labeled the activity regulated a public nuisance and, in doing so, had created an exception to the taking guarantee far broader than the Court had ever recognized. 480 U.S. at 512. The Chief Justice would have found the statute to effect a taking because, he concluded:

> A broad exception to the operation of the Just Compensation Clause based on the exercise of multifaceted health, welfare, and safety regulations would surely allow government much greater authority than we have recognized to impose societal burdens on individual landowners, for nearly every action the government takes is intended to secure for the public an extra measure of "health, safety, and welfare."

480 U.S. at 512.

BQI has viable, important federal constitutional claims arising out of the Borough's regulations affecting the use of its property. It was entitled to have its federal taking claims tried by a federal court applying federal constitutional principles. It properly preserved this right by reserving the federal constitutional claims and not submitting them to the state court. The district court and the Third Circuit have deprived BQI of its right to have its federal constitutional claims adjudicated by a federal court.

CONCLUSION

The district court in effect abstained or stayed the federal action pending the trial of the state court action. BQI adequately reserved its rights to submit its federal constitutional claims to a federal court. The Third Circuit erred in finding that BQI would be precluded by New Jersey's entire controversy doctrine from asserting its federal constitutional claims since New Jersey courts would not have applied to BQI the bar of the entire controversy doctrine. Nor would BQI be precluded by *res judicata* since its federal constitutional claims were not raised, litigated and adjudicated in the state action. The order of the Third Circuit should be reversed and the case remanded for trial.

Respectfully submitted,

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& KING
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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MARCH 8, 1991

Filed March 8, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5783

BERNARDSVILLE QUARRY

Appellant

v.

BOROUGH OF BERNARDSVILLE

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 88-02427)

Submitted Under Third Circuit Rule 12(6)
February 22, 1991

Before: GREENBERG and COWEN,
Circuit Judges,
BUCKWALTER, *District Judge**

(Filed March 8, 1991)

Clifford W. Starrett
Schenck, Price, Smith & King
10 Washington Street
Morristown, New Jersey 07963

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*Honorable Ronald L. Buckwalter, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

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OPINION OF THE COURT

COWEN, *Circuit Judge*.

This appeal concerns the propriety of the district court's dismissal of a complaint filed by Bernardsville Quarry, Inc. ("BQI"). BQI sued the Borough of Bernardsville (the "Borough") in federal court on May 31, 1988. In response to the Borough's motion, the district court dismissed BQI's federal action on August 13, 1990, because BQI had sued the Borough in a separate action based on the same underlying facts in the New Jersey Superior Court and lost. The district court concluded that under *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984), it was required to accord the same preclusive effect to the state adjudication as would the courts of New Jersey, in accordance with the federal full faith and credit statute, 28 U.S.C. § 1738.

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. Our jurisdiction is

predicated on 28 U.S.C. § 1291. Because we agree that the district court was required to accord the same preclusive effect to the state adjudication as would the courts of New Jersey, and that under New Jersey law, BQI would be precluded from relitigating its claims against the Borough, we will affirm the dismissal of BQI's complaint.

I.

In its federal complaint, BQI alleged that the Borough was depriving it of rights protected by the Fifth and Fourteenth Amendments in violation of the Constitution by refusing to grant BQI a Certificate of Occupancy and Use for a parcel of property which BQI hoped to exploit as a quarry to the greatest extent commercially practicable. BQI sought a declaratory judgment that a local ordinance which limited the use of BQI's quarry operations to a certain depth was unconstitutional. In addition, BQI sought damages under 42 U.S.C. § 1983.

BQI's federal complaint was the second prong of a two-prong attack against the Borough and the local ordinance which limited quarry operations to a specified depth. A few days before filing the federal suit, BQI filed a similar suit in the Superior Court of New Jersey. In state court, BQI sought relief similar to the relief requested in the federal suit based not only on federal and constitutional rights, but also on the added grounds that the restriction in quarry operations violated state law and a number of rights guaranteed by the state constitution.

In January 1989, the Borough filed a motion in the district court seeking an abstention, or in the alternative, a stay pending resolution of the state

action. The district court denied the motion and ordered the parties to proceed with discovery. When the state action went to trial on April 18, 1989, however, the district court stayed the federal action pending resolution of the state case. Final judgment in the state action was entered on January 8, 1990. The Superior Court found that the ordinance limiting the depth of quarry operations was a valid exercise of police power and that the Borough was not liable under section 1983 for damages.

After the Superior Court entered its January 8, 1990 order, the Borough moved to dismiss the federal complaint. The district court granted the motion on August 13, 1990. In an Opinion and Order of Dismissal, the district court concluded that under *Migra*, 465 U.S. 75, it was required to accord the same preclusive effect to the state adjudication as would the courts of New Jersey, in accordance with the federal full faith and credit statute, 28 U.S.C. § 1738, and that under New Jersey law, BQI would be precluded from relitigating its claims against the Borough. We agree.

III.

Initially, we must determine what legal precepts control the disposition of this case. BQI, on the one hand, contends that we are dealing in this case with an *England* reservation and that the district court erred by applying the principles of *Migra*. *See England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) (any party to a litigation may reserve his right under abstention doctrine to return to federal court to litigate the federal issues where the federal court

has abstained pending resolution of a parallel state court action). The Borough, on the other hand, argues that *Migra* controls.

BQI's argument that this case involves an *England* reservation is flawed for two reasons. First, an *England* reservation only applies where the district court abstains. Here, the district court did not abstain. In fact, the district court expressly refused to abstain or stay its proceedings while the state proceedings moved forward on a parallel track. Second, a party is generally required to inform the *state* court that it intends to return to federal court for litigation of its federal claims, in the event that the state court rules against it. *England*, 375 U.S. 421-22. Here, BQI failed to inform the state court that it wished to pursue its federal claims in federal court.[1] These two factors in addition to the record as a whole lead us inextricably to the conclusion that BQI unreservedly litigated its federal claims in state court and thereby elected to forego its right to return to federal court, so that even if the *England* reservation rubric were applicable, BQI would not be entitled to return to federal court in this case. We will therefore apply the *Migra* analysis to determine whether the court was justified in dismissing BQI's complaint.

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1. BQI has quoted from the record of a proceeding before the district court to support its assertion that it took an *England* reservation. As we have said before, however, the party wishing to make an *England* reservation must make his intention known to the state court, not the federal court.

IV.

In *Migra*, 465 U.S. at 81, the Supreme Court stated that "It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Id.* The only question then is whether another New Jersey court would have allowed BQI to raise its federal claim in a subsequent state court action. We conclude that it would not.

Pursuant to the Entire Controversy Doctrine under New Jersey law, a plaintiff is precluded from litigating in a subsequent proceeding both claims that it actually litigated and claims that it could have litigated in an earlier proceeding. *See Woodward-Clyde Consultants v. Chemical & Pollution Sciences, Inc.*, 105 N.J. 464, 472-73 (1987) (quoting *William Blanchard Co. v. Beach Concrete Co.*, 150 N.J. Super. 277, 292 (App. Div.), *cert. denied*, 75 N.J. 528 (1977)). To the extent then that BQI did not adjudicate every aspect of its federal claims, it is now barred from raising them again. Of course, if the district court had abstained, BQI could have avoided the effect of the Entire Controversy Doctrine by informing the state court of its intention to return to federal court to litigate its federal claims. But, that course was not open to BQI because the district court elected not to abstain. Accordingly, BQI had but one choice when the state action went to trial – which was to litigate every claim it had to the best of its ability – which, judging from the record, BQI did skillfully. Unfortunately for BQI, it did not prevail. BQI cannot avoid the consequences of its failure

to prevail in state court by taking a second bite of the apple now. We will therefore affirm the judgment of the district court dismissing this case in its entirety.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — MEMORANDUM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY ENTERED AUGUST 14, 1990

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL NO. 88-2427 (GEB)

BERNARDSVILLE QUARRY, INC.,

Plaintiff,

vs.

BOROUGH OF BERNARDSVILLE, et. al.,

Defendants.

MEMORANDUM AND ORDER

BROWN, District Judge

This matter is before the Court on a motion by defendants to dismiss the complaint. Defendants contend that principles of claim preclusion require dismissal of the complaint because all issues were tried, or should have been tried, in a parallel state action. *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984). Plaintiff, on the other hand, argues that it has properly reserved its federal claims for trial in this Court, citing *England v. Louisiana Medical Examiners*, 375 U.S. 411 (1964).

Appendix B

I. BACKGROUND

According to the complaint, plaintiff purchased a large tract of land in the Borough of Bernardsville on March 2, 1987. This land had allegedly been utilized since the early part of the century as a quarry and also housed concrete processing facilities. In 1963, the New Jersey Supreme Court issued a judgment declaring that the owners of the property "and their successors in ownership of the quarry . . . have a non-conforming general quarry use of the quarry area . . . and have the right to continue such non-conforming quarry . . . uses . . . without prohibition or restraint by municipal zoning ordinance . . . . *See* Complaint, ¶7 .

Following plaintiff's purchase of the property, defendants required plaintiff to apply for a Continued Certificate of Occupancy and Use (CCO) in accordance with local ordinance. Plaintiff filed an application for a CCO, but defendants denied the application on March 11, 1987, stating that "the only current use of which we are aware is a concrete plant." *Id.* ¶ 17. Although defendants eventually issued a CCO for the concrete processing facilities, they refused to issue one for the quarry operations.

On July 20, 1987, defendants adopted a Quarry License Ordinance (the "Ordinance") which, among other things, limited the depth of quarry operations in the Borough of Bernardsville. Plaintiff filed an application for a quarry license pursuant to this Ordinance, which application was denied by a resolution of the Borough (the "Resolution") on April 11, 1988.

On May 31, 1988, plaintiff filed a two-count complaint in this Court for alleged violations of the Taking Clause of the Fifth Amendment and 42 U.S.C. § 1983. More specifically, in Count One of the complaint, plaintiff seeks a declaratory judgment that

Appendix B

§ 9(e) of the Ordinance, which states that "[n]o quarrying shall be permitted which will reduce the quarried area below the lowest grade of adjoining properties," is invalid as an unconstitutional taking of property without just compensation. *See* Complaint, ¶22 . Plaintiff contends that this limitation conflicts with the 1963 judgment of the New Jersey Supreme Court. In Count Two of the complaint, plaintiff alleges that the denial of its application for a quarry license was the "culmination of a course of action consciously chosen" by defendants to deprive plaintiff of its constitutional rights in violation of 42 U.S.C. § 1983, and seeks damages under that statute.

A few days after plaintiff filed its federal complaint, it filed a similar complaint in state court. The second count of the state complaint is identical to Count One of the federal complaint in its factual allegations. However, where Count One seeks a declaration that § 9(e) of the Ordinance violates the Takings Clause of the Fifth Amendment, the second count of the state complaint seeks a judgment that § 9(e) "deprives the plaintiff of its property, including valuable stone reserves without due process and without just compensation in violation of the New Jersey Constitution." The fifth count of the state complaint is in all respects identical to Count Two of the federal complaint, seeking damages under 42 U.S.C. § 1983 based on defendant's actions in adopting the Resolution denying plaintiff's application for a quarry license.

The state complaint also goes further than its federal counterpart, asserting three additional counts entirely under state law. In the first count, plaintiff prays for an injunction compelling defendants to issue a CCO and a quarry license. In the third count, plaintiff seeks a declaratory judgment invalidating certain provisions of the Ordinance which were not directly challenged

in this Court. Finally, in the fourth count of the state complaint, plaintiff asks for damages and injunctive relief against defendants for allegedly perpetuating a private and public nuisance by preventing plaintiff from continuing quarry operations.

On January 1989, defendants filed a motion in this Court for abstention or, in the alternative, for a stay pending resolution of the state action. This Court denied the motion, and ordered the parties to continue with discovery, and to appear before the Court for a status conference on April 17, 1989. However, the status conference and all other proceedings in this Court were thereafter adjourned when the state case went to trial on April 18, 1989. Following a long trial, the state court issued a written opinion, including findings of fact, on October 6, 1989. *See* Certification of Richard P. Cushing, Exhibit C. A Final Judgment was entered on January 8, 1990. *Id.* Exhibit D. As to the second count of the state complaint, the court found that "the limitation on the depth of excavation in Section 9(e) of the Quarry License Ordinance is a valid exercise of the general police power and not an unlawful deprivation of the plaintiff's property without due process and without just compensation *under the laws of the State of New Jersey.*" *Id.* at 3 (emphasis added). As to the fifth count of the complaint, which asserted a federal claim under § 1983, the court entered judgment in favor of defendant Borough of Bernardsville "on the allegations set forth in the Fifth Count." *Id.* at 4.[1]

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1. Plaintiff met with only limited success on the other counts of the state complaint. On the first count, the state court found that the denial of plaintiff's application for a quarry license on April 11, 1988, was arbitrary and capricious, and it remanded the matter to the Borough Council for reconsideration, but it entered judgment for defendants on the other claims. On the third count, the court held invalid the provision of the Ordinance which limited the hours

(Cont'd)

Appendix B

II. DISCUSSION

The parties are now before this Court on a motion by defendants to dismiss the complaint. Defendants argue that *Migra v. Warren City School Dist. Bd. of Educ,* 465 U.S. 75 (1984). compels the dismissal of this complaint. The argument is a persuasive one. In *Migra,* the Supreme Court held that the full faith and credit statute, 28 U.S.C. § 1738, requires a federal court to accord the same claim preclusive effect to a state adjudication as would the courts of that state. *Id.* at 85. The plaintiff in *Migra* had brought suit in an Ohio state court solely on state causes of action. After winning a judgment, she then brought suit in federal court, alleging that the same facts constituted a violation of her federal constitutional rights and 42 U.S.C. § § 1983 and 1985. Because the law of Ohio would have barred the plaintiff from litigating in a second suit claims which she could have brought in the first, the Supreme Court held that 28 U.S.C. § 1738 prohibited the plaintiff from pursuing her second suit in a federal court.

Migra clearly precludes plaintiff from litigating its federal claims in this Court. Plaintiff brought two suits, nearly simultaneously, in state and federal court based on identical facts. Having proceeded to trial first in state court, and having lost there on its claim that § 9(e) of the Ordinance exacts a taking of property violative of the New Jersey Constitution, plaintiff now claims the right to return to this Court and assert that the same facts it presented to the state court entitle it to a different result under

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(Cont'd)
of quarry oprations, but it upheld the other provisions challenged by plaintiff. Finally, on the fourth count, the court entered judgment for defendants.

the federal Constitution.[2] But *Migra* held that a plaintiff should not get two bites at the same apple, even where that plaintiff is careful to sue on his federal claims only in federal court, and his state claims only in state court:

> [28 U.S.C. § 1738] embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims. This reflects a variety of concerns, including notions of comity, the need to prevent vexatious lititigation, and a desire to conserve judicial resources.

Migra, 465 U.S. at 84.

The only question is whether, under New Jersey law, plaintiff would be precluded from raising in a second state action the claims it has raised in this Court. The answer to this question is simple, for New Jersey's "Entire Controversy Doctrine" holds that "a party who has elected to hold back from the first proceeding a related component of the controversy be barred from thereafter raising it in a subsequent proceeding." *William Blanchard Co. v. Beach Concrete Co.*, 150 N.J. Super. 277, 292 (App. Div. 1977), *quoted in Woodward-Clyde Consultants v. Chemical and Pollution Sciences, Inc.*, 105 N.J. 464, 473 (1987). Therefore, because the courts of New Jersey would bar this action had it been brought

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2. Plaintiff certainly cannot argue that it is entitled to pursue its claim in Count Two of the federal complaint, which is based on 42 U.S.C. § 1983. That claim was clearly submitted to the state court as a § 1983 claim, and plaintiff's counsel concedes as much in a letter to the Court dated January 26, 1990, where he asserts that the "only" issue remaining for resolution by this Court is the takings claim in Count One of the federal complaint.

in state court, this Court is bound by *Migra* and § 1738 to do the same.

Plaintiff argues that it properly reserved the right to litigate its federal claims in this Court under *England v. Louisiana Medical Examiners,* 375 U.S. 411 (1964). *England* held that where a federal plaintiff is compelled to litigate his state claims in state court because of an abstention order under *Railroad Comm'n v. Pullman Co.,* 312 U.S. 496 (1941), he can reserve the right to return to federal court for disposition of his federal constitution claims. Though *Migra* did nothing to affect the availability of an *England* reservation, *see* 465 U.S. at 85 n.7, *England* is applicable only where, unlike here, the federal court abstains under the *Pullman* doctrine. *See, e.g., Schuster v. Martin,* 861 F.2d 1369, 1374 (5th cir. 1988); *Tarpley v. Salerno,* 803 F.2d 57, 59-60 (2d Cir. 1986); *Griffin v. Rhode Island,* 760 F.2d 359, 360 (1st Cir. 1985).[3] If the law were otherwise, the *England* exception would swallow the *Migra* rule, for plaintiffs could then bring parallel suits in state and federal court free of the fear that state preclusion law would later bar their federal claims. Such a result clearly would conflict with *Migra,* and the Court therefore rejects the argument that *England* is available here to save plaintiff's federal suit. Defendants' motion to dismiss will be granted.

---

3. The Court intimates no view as to whether an *England*-type reservation would be available in the absence of a *Pullman* abstention, but where the plaintiff is still "compelled, without his consent and through no fault of his own," 375 U.S. at 415, to litigate first in state court. *See Peduto v. City of North Wildwood,* 696 F.Supp. 1004 (D. N.J. 1988), *aff'd,* 878 F.2d 725 (3d Cir. 1989). Here, of course, plaintiff was not compelled to first obtain a determination from the state court on its state claims, but was free to bring all of its claims, state and federal, in this Court.

Appendix B

For the above reasons, it is on this 13th day of August, 1990,

ORDERED that defendants' motjon to dismiss be and is hereby granted.

GARRETT E. BROWN, JR., U.S.D.J.

APPENDIX C — FINAL JUDGMENT OF SUPERIOR COURT OF NEW JERSEY LAW DIVISION DATED JANUARY 8, 1990

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : SOMERSET COUNTY

DOCKET NO. W-27465-88 P.W.

BERNARDSVILLE QUARRY, INC., a New Jersey Corporation,

Plaintiff,

vs.

BOROUGH OF BERNARDSVILLE, a Municipal Corporation, et al.,

Defendant.

The above captioned matter having come on for trial before the Hon. Robert E. Guterl, J.S.C., and in the presence of Clifford W. Starrett, Esq., attorney for plaintiff, and Dennis Cipriano, Esq., attorney for the Borough of Bernardsville, and Richard P. Cushing, Esq., co-counsel for the Borough of Bernardsville, and attorney for John Doe, etc., and the Court having taken testimony from April 18, 1989 through June 20, 1989, and having considered the briefs and arguments of counsel and all of the issues raised in the Complaint and the Pretrial Order having been resolved or otherwise disposed of in accordance with the Court's written

Appendix C

Opinion of October 6, 1989 and this Final Judgment;

IT IS on this 8th day of January, 1990, ORDERED as follows:

FIRST COUNT OF COMPLAINT

(a) Anthony Ferrante & Sons, Inc., the former owner and operator of the quarry known and designated as Block 100, Lot 2 on the Official Tax Map of the Borough of Bernardsville ("Quarry") did not abandon the non-conforming use of the property for quarry purposes and that the plaintiff, Bernardsville Quarry, Inc., as the subsequent owner, had a right to continue the pre-existing, non-conforming use to the property and the stripping areas as more particularly set forth in a Final Judgment dated April 24, 1963 in the matter of *Somerset Crushed Stone, Inc. et al., Plaintiffs v. the Borough of Bernardsville*, Defendant Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-7854-58 ("1963 Judgment").

(b) Judgment is entered in favor of the defendant and against the plaintiff affirming the denial of the continuing Certificate of Occupancy to plaintiff by the Zoning Officer of the Borough on March 11, 1987;

(c) Judgment is entered in favor of the plaintiff, Bernardsville Quarry, Inc., and against the defendant, the Borough of Bernardsville, that the denial of the application for a quarry license on April 11, 1988 was arbitrary and capricious and the matter is remanded to the Borough Council for reconsideration as hereinafter provided.

(d) Judgment is entered in favor of defendant, Borough of

Bernardsville, on the remaining allegations of the First Count of the Complaint.

SECOND COUNT OF THE COMPLAINT

Judgment is entered in favor of defendant, Borough of Bernardsville, and against the plaintiff, Bernardsville Quarry, Inc., as follows:

(a) That the limitation on the depth of excavation in Section 9(e) of the Quarry License Ordinance is a valid exercise of the general police power and not an unlawful deprivation of the plaintiff's property without due process and without just compensation under the laws of the State of New Jersey.

THIRD COUNT OF THE COMPLAINT

(a) Judgment is entered in favor of plaintiff, Bernardsville Quarry, Inc., and against the defendant, Borough of Bernardsville, that the provisions of Section 9 of the Quarry Licensing Ordinance limiting the hours of quarry operation be and the same is hereby declared invalid.

(b) That Judgment be entered in favor of the defendant, Borough of Bernardsville, and against the plaintiff, Bernardsville Quarry, Inc., adjudging and declaring that the remaining provisions of the Quarry Licensing Ordinance challenged in the Third Count of the Complaint be and the same are hereby declared valid and enforceable.

(c) Except as herein specifically provided in paragraph (a) above, Judgment is entered in favor of the defendant, Borough of Bernardsville, and against the plaintiff, Bernardsville Quarry,

Inc., on the Third Count of the Complaint.

FOURTH COUNT OF THE COMPLAINT

Judgment is hereby entered in favor of the defendant, Borough of Bernardsville, and against the plaintiff, Bernardsville Quarry, Inc., on the allegations set forth in the Fourth Count.

FIFTH COUNT OF THE COMPLAINT

Judgment is hereby entered in favor of the defendant, Borough of Bernardsville, and against the plaintiff, Bernardsville Quarry, Inc., on the allegations set forth in the Fifth Count.

COUNTERCLAIM OF DEFENDANT
BOROUGH OF BERNARDSVILLE

Judgment is entered in favor of plaintiff, Bernardsville Quarry, Inc., and against the defendant, Borough of Bernardsville, on the Counterclaim.

REMAND TO THE BOROUGH COUNCIL
OF THE BOROUGH OF BERNARDSVILLE

Judgment is hereby entered that to the extent not otherwise resolved by this Final Judgment the plaintiff is given the option of having the matter remanded to the Borough Council of the Borough of Bernardsville for reconsideration of the application for a quarry license within 45 days of the Court's decision on October 6, 1989.

IT IS FURTHER ORDERED that upon reconsideration, the Borough Council shall impose reasonable conditions to include

compliance with all provisions of the Quarry Licensing Ordinance with the exception of those related to the hours of operation which have been deemed to be invalid. Bernardsville Quarry shall provide a revised Reclamation Plan in accordance with the provisions of the Quarry Licensing Ordinance within one hundred twenty (120) days of this decision. No quarrying, other than operations which are presently permitted, shall be commenced until the submission and approval of the revised Reclamation Plan.

PLAINTIFF'S ELECTION TO SEEK IMMEDIATE APPEAL

Plaintiff having been advised to its right to a remand in accordance with the prior Section of this Final Judgment and having advised the Court and defendant, Borough of Bernardsville, that it does not intend to apply to the Borough Council for reconsideration of its application for a Quarry License until the validity of the limitation on quarrying below elevation 350 feet above sea level has been finally determined, the Court does not retain jurisdiction as provided in the Court's Opinion dated October 6, 1989 and the within Judgment shall be deemed a Final Judgment for the purpose of appeal.

s/ Robert E. Guterl,
Robert E. Guterl, J.S.C.

Supreme Court, U.S.
FILED
AUG 9 1991
OFFICE OF THE CLERK

(2)

No. 91-111

In The

Supreme Court of the United States

October Term, 1991

BERNARDSVILLE QUARRY, INC.,

Petitioner,

vs.

BOROUGH OF BERNARDSVILLE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Third Circuit Court of Appeals correctly determine that Petitioner failed to properly notify the state court and Respondents of an intent to reserve its federal claims for trial in the federal court?

2. Can a plaintiff which voluntarily brings parallel lawsuits in federal District Court and state court effectively reserve its rights to litigate federal claims in federal court under *England v. Louisiana Medical Examiners* where it makes no clear reservation on the record in state court and chooses to litigate some, if not all, of its federal claims in the state court action?

3. May a plaintiff which brings separate but parallel lawsuits in both federal and state court and which has the state case reached for trial first, without the federal district court having abstained, withhold some but not all federal claims for trial in the federal action if those claims would be collaterally estopped by the judgment in the state court action under state law?

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CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

a. 28 U.S.C. §1331. *Federal Question.*

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

b. 28 U.S.C. §1738. *State and Territorial statutes and judicial proceedings; full faith and credit.*

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.

c. Constitution of the United States, Amendment V. *Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property.*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on

a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

d. Constitution of the United States, Amendment XIV, Section 1. *Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement.*

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

e. Constitution of the State of New Jersey, 1947, Art. 1, par. 20. *Private property for public use.*

Private property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners.

f. Constitution of the State of New Jersey, 1947, Art. 4, par. 1. *Natural and unalienable rights.*

All persons are by nature free and independent, and have certain natural and unalienable

rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

g. New Jersey Court Rule 4:27-1 (1988). *Joinder of Claims and Remedies.*

(a) Permissive Joinder. The plaintiff in his complaint or in an answer to a counterclaim denominated as such and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims, either legal or equitable or both, as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of R. 4:28 (joinder of parties), R. 4:29 (joinder of multiple parties), and R. 4:31 (interpleader) are satisfied. There may be a like joinder of crossclaims or third-party claims if the requirements of R. 4:7 (counterclaim and cross-claim) and R. 4:8 (third-party practice) respectively are satisfied.

(b) Mandatory Joinder. Each party to an action shall assert therein all claims which he may have against any other party thereto insofar as may be required by application of the entire controversy doctrine.

STATEMENT OF THE CASE

A. Procedural History of Federal and State Actions.

On May 25, 1988, Bernardsville Quarry, Inc. (hereinafter referred to as "BQI") filed a Complaint against the Borough of Bernardsville (hereinafter referred to as the "Borough") in the Superior Court of New Jersey, Law Division, Somerset County, Docket No. W-27465-88-PW

(hereinafter referred to as the "state action") (Ra-1a).[1] A parallel action was filed in federal District Court for the District of New Jersey on May 31, 1988 (Ra-20a). Each Complaint was based partly on federal and partly on state law grounds. Both Complaints alleged a taking of Plaintiff's property without just compensation arising out of the depth limitation in the Borough quarry ordinance. In the state court Complaint, Plaintiff relied on the New Jersey Constitution; in the federal Complaint, virtually identical allegations were based on the United States Constitution. The Fifth Count of the Plaintiff's state court Complaint is entitled "1983 Claim" and seeks damages and attorney's fees because BQI was wrongfully deprived "of its property, rights, privileges and immunities secured by the Constitution and laws of the United States and of the State of New Jersey under color of the statutes, ordinances and regulations of the State of New Jersey and its agencies and the Borough of Bernardsville in violation of 42 U.S.C. §1983." (Ra-18a).

No significant activities occurred in the federal case until November 1988 when Defendants moved before the District Court for abstention or a stay of the action, which was opposed by Plaintiff. On January 16, 1989, the District Court denied the Motion but extended discovery and scheduled a status conference on the case; the status conference was later adjourned because the trial in the state court action had commenced.

The state court action was tried before the Honorable Robert Guterl, sitting without a jury. The testimonial

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[1] Cites to Respondent's Appendix are referred to as Ra, Petitioner's Appendix as Pa.

phase of the trial lasted more than ten weeks, commencing on April 18, 1989, and ending June 20, 1989. Twenty-two witnesses testified, of whom 14 were expert witnesses, in fields ranging from hydrogeology to real estate valuation and municipal planning. Much of this testimony dealt with complex, highly technical scientific issues.

Both parties filed post-trial Briefs, proposed findings of fact and conclusions of law. The trial court rendered a 42-page written Opinion on October 6, 1989 (Ra-39a).[2] The Borough prevailed on almost every significant issue in the case, including the taking issue and the §1983 claims raised in Count V of the state court Complaint.

The Appellate Division sustained the trial Judge in an unpublished Opinion dated June 27, 1991. BQI has now filed a Notice of Petition for Certification to the New Jersey Supreme Court.

On March 13, 1990, Defendant, Borough of Bernardsville, filed a Motion seeking dismissal of Plaintiff's federal Complaint. Oral argument was heard by the Honorable Garrett E. Brown, Jr., on April 23, 1990. Judge Brown rendered a written Opinion and Order of Dismissal on August 14, 1990. Plaintiff appealed to the Third Circuit Court of Appeals and lost and now petitions this Court for *certiorari*.

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[2] For purposes of brevity, only excerpts from the Opinion relevant to this Petition have been included in Respondent's Appendix.

B. Factual History.

In March 1987, BQI purchased a non-operative quarry in the Borough of Bernardsville at a Sheriff's Sale for a price of $3,825,000.00. BQI sought the necessary approvals from the Borough to resume full quarrying operations at the site. The Borough issued a temporary certificate of occupancy, which permitted the operation of a concrete plant on the premises, but declined to issue a permit which would allow quarrying to resume because of environmental concerns, including the presence of asbestos, which originated with the operations of BQI's predecessor in title. On July 20, 1987, the Borough adopted a quarry license ordinance which established regulations on the operation of quarries, including, most significantly, a limitation on the depth of quarrying which prohibited quarrying below the level of adjacent railroad tracks. This depth limitation, Plaintiff contended, prevented it from quarrying virtually all of the remaining basalt reserves on the site. BQI filed an application for a quarry license which indicated that BQI sought to quarry below the elevation permitted in the ordinance. The application for a quarry license was denied by the Borough. BQI responded by filing two separate actions, one in federal court and one in New Jersey state court.

The Complaints were very similar, although the state court Complaint contained additional claims brought under state law which were not addressed in the federal action. However, both Complaints alleged a taking of BQI's property in violation of law and violations of BQI's civil rights pursuant to 42 U.S.C. §1983. The action filed in New Jersey state court reached trial prior to the federal action and the state court Judge who presided over the

trial issued an opinion finding that there had been no taking of Plaintiff's property under the laws of the State of New Jersey. The state court Judge also dismissed Count V of BQI's Complaint, which alleged violations of 42 U.S.C. §1983. A review of the Opinion of the trial court indicates that he specifically found that the Borough had legitimate reasons for imposing the depth limitation, that substantial environmental concerns existed which justified regulating quarrying, even though the effect of the regulation was to prevent BQI from realizing the full profit potential of its property. He further held that the property retained substantial value despite the regulations (Ra-49a).

After judgment by the New Jersey trial court, the Borough filed a Motion to dismiss the federal action on the grounds that the state court Judgment was entitled to full faith and credit and that the Judgment was binding on the federal court to the same extent that it would be under the laws of New Jersey. The Borough argued that, under New Jersey law, BQI was precluded from raising any claims which arose out of the same transaction or occurrence and which should have been joined pursuant to the entire controversy doctrine and that the doctrines of *res judicata* and of collateral estoppel, as recognized by New Jersey courts, conclusively bound BQI to the holding of the New Jersey court that no taking had occurred. The Borough further argued that BQI had not notified the state court that it sought to reserve its federal claims for the District Court and had fairly litigated those claims before the state court and lost. BQI contended that it had properly reserved its federal claims for adjudication by the federal District Court and that it was entitled to a trial

on whether there had been a taking under the United States Constitution irrespective of what had occurred in state court. The District Court agreed with the Borough that BQI had not reserved its federal claims and New Jersey law would have precluded the litigation of the same or related claims in state court and applied the same preclusive effect resulting in the dismissal of BQI's Complaint.

Petitioner here is seeking the opportunity to retry the same constitutional issues which have already been decided against it in state court. The facts are the same and the legal precepts are also the same. Petitioner has already had an 11-week trial in state court and now seeks the opportunity to drag the Borough back to court for another "take" of the taking issue in federal court. The District Court properly held that Plaintiff's claims were precluded and declined to allow BQI two bites at the apple. In affirming, the Third Circuit properly applied the law as enunciated by the Court in *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), in an opinion consistent with other Third Circuit decisions as well. There is no issue involved here which requires review by the Supreme Court of the United States.

REASONS FOR DENYING THE WRIT

The Third Circuit Court of Appeals properly applied decisions of this Court in reaching its conclusion that BQI had failed to properly reserve its federal claims for trial in the federal court, had unreservedly litigated its federal claims in state court and would be precluded under state

law from raising any remaining federal claims in a subsequent state court action. The Third Circuit's Opinion is also consistent with other decisions of the Third Circuit and the other Circuit Courts of Appeal. Dismissal of BQI's federal Complaint under the circumstances of the case as a whole was mandated.

I.

THE PETITION CONTAINS MISSTATEMENTS OF FACT AND LAW WHICH PERTAIN TO THE QUESTION OF WHETHER THE WRIT SHOULD BE GRANTED.

The Brief submitted by Petitioner in support of the Writ contains misstatements of fact and references to "facts" which do not appear of record before this Court, which confuse the record and bear on the questions of the issues which may properly be before this Court. BQI has distorted the facts in an attempt to convince this Court that it reserved its federal claims for adjudication in the federal courts under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). BQI does not offer this Court any record at all on which to base its factual assertions, having not bothered to include in its Appendix portions of the record below from which it takes the liberty of offering quotations taken out of context and unfair characterizations of what the record actually contains. The factual assertions in BQI's Brief are not supported by even one page reference to its Appendix, which in turn does not contain the relevant portions of the record below.

The Borough particularly objects to BQI's repeatedly stated assertions that it had clearly reserved its federal

claims for adjudication in federal court and that the state court and Respondent had known about this reservation and agreed to it. BQI can point to nothing in the record which supports this assertion and, in lieu of appending those portions of the record below which it contends support its reservation argument, it relies on an excerpt from a colloquy between counsel during the abstention Motion decided by Judge Brown which takes defense counsel's words out of context. As argued in Point III, *infra*, defense counsel never agreed to a reservation, were never asked to agree to a reservation and no attempt at a reservation before the state court was made.

BQI characterizes its state Complaint as only raising state law issues and its federal Complaint as only raising federal claims but a review of the two pleadings, which BQI did not bother to include in its Appendix, makes clear that state claims were being raised in the federal Complaint and that federal claims, including a claim based on 42 U.S.C. §1983, were included in the state Complaint (Ra-1a; Ra-20a). Furthermore, BQI unreservedly litigated its §1983 claim in state court, including the claim in its pretrial memorandum and trial Brief and losing it before the state court. Plaintiff now contends that its §1983 claim was based only on state law and was separate and apart from its taking claim under the United States Constitution. If the Borough and the state trial Judge had agreed that Plaintiff's taking claims did not implicate federal law, there would have been no need for them to cite or rely on decisions of this Court with respect to the taking issue, yet the Borough cited to decisions of this Court and the lower federal courts and

the trial Judge also relied on federal cases in his Opinion (Ra-44a-45a).

BQI implies that its compliance with New Jersey Court Rule 4:5-1, which requires a party to include with its first pleading a certification concerning related actions and the names of parties who should be joined in the action, was sufficient to alert the Borough and the trial court to BQI's intent to reserve its federal claims for adjudication in federal court. The purpose and intent of New Jersey Court Rule 4:5-1, are described by the Honorable Sylvia B. Pressler as follows:

> The purpose of this amendment is in implementation of the philosophy of the entire controversy doctrine. See generally R. 4:27-1(b) and Comment thereon. While ordinarily a party's failure to comply with the entire controversy doctrine puts only himself at risk of its preclusionary consequences, this rule recognizes that this is not always so, particularly where the entire controversy involves the rights of persons who are not parties to an action as framed. . . . The intent of this rule is to provide notice to all parties in each action that there are other actions pending involving the same controversy. As a result of such notice, all parties can move to intervene in other pending actions, to consolidate other pending actions, or to take whatever other steps may be appropriate to protect their respective interests.

Pressler, Sylvia B., Rules Governing the Courts of the State of New Jersey (1988). Neither the Borough nor the state court would have had any reason to suspect that BQI was attempting an *England* reservation because its Rule 4:5-1 certification referred to a federal action not yet filed. Thus, BQI's compliance with this rule is irrelevant to an

analysis of whether an effective *England* reservation was made by BQI.

The record in this case supports the conclusion of the Third Circuit that no *England* reservation had been made by BQI before the state court and that BQI had unreservedly submitted its federal claims for resolution in the state court. That being so, the entire controversy doctrine precluded the continued litigation of BQI's federal case. BQI is blatantly distorting the posture of both the state court case and the district court case so as to make it appear that the Third Circuit did not properly apply *England*, when in fact it did.

II

BQI'S CLAIMS ARE BARRED IN FEDERAL COURT TO THE SAME EXTENT THEY WOULD BE BARRED IN THE COURTS OF NEW JERSEY.

The preclusive effect of a state court judgment is binding on the federal courts to the same extent that the judgment would have preclusive effect under the laws of the state under which the judgment was rendered. 28 U.S.C. §1738. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). In *Allen v. McCurry*, 449 U.S. 90 (1980), this Court held that nothing in 42 U.S.C. §1983 modified the operation of §1738 so that a state court judgment was to receive less than normal preclusive effect in a suit brought in federal court under §1983. *Allen* pertained specifically to the doctrine of issue preclusion, the effect of a judgment in foreclosing litigation of a matter that has been litigated and decided, but the reasoning would also apply to the doctrine of collateral estoppel, that facts determined in a prior action between parties are binding

on them in subsequent actions. In the present case, the taking issue was previously tried by the Superior Court of New Jersey, whose decision and findings of fact are binding on the federal courts. Although BQI has argued that Judge Guterl's decision on the taking issue was based solely on the New Jersey Constitution and not the United States Constitution, this contention does not help BQI.

The legal standard for a taking is virtually the same under the New Jersey Constitution and the Federal Constitution. In fact, the New Jersey Supreme Court has held that the protections afforded under the New Jersey Constitution of 1947 are identical to or broader than their federal counterparts. *Right to Choose v. Byrne*, 450 A.2d 925, 932, 91 N.J. 287, 300 (1982).

Both the Federal and the State Constitution provide that private property shall not be taken for public use "without just compensation." In addition, both Constitutions provide that the state shall not take any property "without due process of law." Furthermore, the New Jersey Constitution is even broader because its due process clause is broader and more complete than the Fourteenth Amendment's due process clause.

That the courts of New Jersey recognize the New Jersey Constitution affords equal or greater rights to citizens to acquire and possess property is confirmed by *Right to Choose v. Byrne*, where Justice Pollock observed that the New Jersey Constitution affords its citizens broader rights than might be allowed under federal law:

> In more expansive language than that of the United States Constitution, Art. I, par. 1 of the

> New Jersey Constitution provides: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness." The state Bill of Rights, which includes that provision, has been described as expressing " 'the social, political, and economic ideals of the present day in a broader way than ever before in American Constitutional history.' " Milmed, "The New Jersey Constitution of 1947" in N.J.S.A. Const., Arts. I-III 91 at 110 (1971).

450 A.2d at 933, 91 N.J. at 303.

In *Southland Corp. v. Edison Township*, 524 A.2d 1336, 217 N.J. Super. 158 (Law Div. 1986), the court, in analyzing a constitutional challenge to an ordinance under both federal and state law, said, "This Court has elected to analyze the current case under this State's constitutional concept since the nature of the issues now before it (private property rights vs. the police power) afford our citizens broader rights than might be allowed under federal law." 524 A.2d at 1344, 217 N.J. Super. at 174.

Thus, it is clear that BQI had the same or greater rights under the New Jersey state constitutional provisions for a taking as it did under the Federal Constitution. No wonder that BQI preferred to have the state court consider the taking issue under New Jersey law, since the New Jersey cases provided greater protection. BQI has fairly litigated the taking issue and lost. Under New Jersey law, the related doctrines of *res judicata* and/or collateral estoppel bar the relitigation of issues or facts already decided among the parties. *Allesandra v. Gross*,

453 A.2d 904, 187 N.J. Super. 96 (App. Div. 1982). The doctrine of issue preclusion bars Plaintiff from relitigating in federal court the taking issue previously determined by the Superior Court of New Jersey or the facts found by the New Jersey trial Judge on which his holding was based.

BQI's claim that New Jersey courts have allowed the presumption of reasonableness which attends municipal action to exert a confiscatory impact upon the rights of property owners is based on inaccurate premises. Exactly the same standard is applied by this Court. Exercise of the police power is presumed to be constitutionally valid. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959). Exercise of the police power will be upheld if any statement of facts either known or which could reasonably be assumed affords support for it. *U.S. v. Carolene Products*, 304 U.S. 144, 154 (1939); *see also Goldblatt v. Town of Hempstead*, 369 U.S. 590, 596 (1962).

Although BQI contends that a consideration of the taking issue under federal constitutional law would differ from that under New Jersey law, this is not the case. In fact, Judge Guterl relied not only on New Jersey cases (each of which themselves are based on decisions of the United States Supreme Court, as well as on decisions of the New Jersey Supreme Court) but also on some of the same cases which BQI is now citing to this Court as supportive of its position. For example, a review of Judge Guterl's Opinion indicates he relied heavily on *Goldblatt v. Town of Hempstead*, 369 U.S. 590, (upholding a regulation prohibiting excavations below a certain depth) (Ra-44a-45a). Judge Guterl also cited *William C. Haas v. City and County of San Francisco*, 605 F.2d 1117, 1120 (9th

Cir. 1979), *cert. denied*, 445 U.S. 928 (1980), *reh'g denied*, 446 U.S. 929 (1980), a case where a regulation was upheld as not an unconstitutional taking, although it reduced the value of plaintiff's property from $2,000,000.00 to $100,000.00 (Ra-45a). The case which BQI criticizes as containing an improper standard on the taking issue, *Orleans Builders & Developers v. Byrne*, 453 A.2d 200, 208, 186 N.J. Super. 432, 446 (App. Div. 1982), applies this Court's holding in *Penn Central Transportation Co. v. City of New York*, 438 U.S 104 (1978), *reh'g denied*, 439 U.S. 883 (1978).

The state trial Judge determined not only that the regulation in question was a valid exercise of the police power enacted to prevent the possibility of substantial environmental damage (Ra-50a-53a) but also that plaintiff's property retained substantial value for other purposes (Ra-48a-49a). Judge Guterl's decision would, on the taking issue, not have differed whether based on state court precedents or federal precedents, since New Jersey law provides equal or greater protection from confiscatory and arbitrary regulation. *Southland Corp. v. Edison Township*, 524 A.2d 1336, 217 N.J. Super. 158.

Furthermore, in *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), this Court extended the reach of 28 U.S.C. § 1738 in § 1983 cases to encompass claim preclusion, as well as issue preclusion. The Third Circuit properly relied on *Migra* as the controlling precedent in this case, since the issue-preclusive effect of state law under New Jersey's entire controversy doctrine prevents litigation of claims which could have been litigated, as well as those actually litigated. In *Migra*, the plaintiff's contract of employment was renewed by the Board of

Education, which reversed its decision after receiving her acceptance. Plaintiff brought suit in state court alleging breach of contract and wrongful interference. The state court ruled in her favor on the breach of contract claim but the tort claim for wrongful interference was dismissed without prejudice at her request. Subsequent thereto, she filed suit in federal District Court alleging that she had been terminated for exercising her First Amendment rights. The state court would have adjudicated plaintiff's federal claims had she presented them in her original suit in state court. This Court stated:

> [p]etitioner could have obtained a federal forum for her federal claims by litigating it first in a federal court. Section 1983, however, does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims. We hold, therefore, that petitioner's state court judgment in this litigation has the same claim preclusive effect in federal court that the judgment would have in the Ohio State courts.

465 U.S. at 84-5.

Thus, even had BQI not litigated all its federal claims in state court, intending to save some of them for the present parallel action, the fact that it did already litigate its related state claims and some of its federal claims would preclude the litigation of any other claims between the parties if BQI would be precluded from litigating again in state court.

Under New Jersey law, the entire controversy doctrine requires that all issues between the parties be tried

in one proceeding. New Jersey Court Rule 4:27-1(b), entitled "Mandatory Joinder," provides as follows: "[e]ach party to an action *shall* assert therein all claims which he may have against any other party thereto insofar as may be required by application of the entire controversy doctrine." [emphasis added]. The entire controversy doctrine requires that all aspects of one party's controversy with the other be included within the litigation.

The nature of the entire controversy doctrine is described in the Appellate Division case of *B.P. v. G.P.*, as follows:

> "The single or entire controversy doctrine evolved 'to eliminate delay, prevent harassment of a party and unnecessary clogging of the judicial system, avoid wasting the time and effort of the parties, and promote fundamental fairness.' " *Aetna Ins. Co. v. Gilchrist Brothers, Inc.*, 85 N.J. 550, 556 (1981), quoting *Barres v. Holt, Rinehart and Winston, Inc.*, 74 N.J. 461, 465 (1977) (Schreiber, J., dissenting).
>
> In *Aetna* Justice Schreiber pointed out that *N.J. Const.*, (1947), Art. VI, § 3, par. 2 invested the Superior Court with statewide jurisdiction "so that all matters in controversy between the parties may be completely determined." *Id.*
>
> The effect of the doctrine is to require a party to include in the action all related claims against an adversary and the failure to do so precludes maintenance of a second action. " '[C]onsistent with the demands of a responsive civil justice system,' the doctrine as generally applied requires 'that a party who has elected to hold back from the first proceeding a related component of the controversy be barred from thereafter raising it in a subsequent proceeding.' "

> *Chrispin v. Volkswagenwerk, A.G.*, 96 N.J. 336, 348 (1984) (Handler, J., concurring), quoting *William Blanchard Co. v. Beach Concrete Co., Inc.*, 150 N.J. Super. 277, 292 (App. Div.) certif. denied, 75 N.J. 528 (1977).

B.P. v. G.P., 536 A.2d 271, 274, 222 N.J. Super. 101, 106-7 (App. Div. 1987). Contrary to BQI's assertion that it had to file suit in state court to protect itself and preserve its state claims in case the District Court declined to exercise pendent jurisdiction, the opposite is true. By filing a complaint in federal court which contains its related state claims, a plaintiff preserves those claims against the application of the entire controversy doctrine in the event the federal court refuses to apply pendent jurisdiction. *Blazer Corp. v. NJ Sports & Exposition Authority*, 488 A.2d 1025, 199 N.J. Super. 107 (App. Div. 1985). Furthermore, BQI did assert some pendent claims in federal court, including the validity of the Bernardsville Quarry ordinance, whether quarrying was a non-conforming use under state law and the extent of any such non-conforming use (Ra-29a). The Third Circuit correctly held that, under New Jersey law, the entire controversy doctrine barred Plaintiff's claims.

BQI is precluded from litigating in federal court the issues which were actually litigated in the parallel state action, as well as any other claims which could have been litigated there. All of the issues and claims before the District Court either were or could have been litigated in the New Jersey Superior Court action. By filing two separate parallel lawsuits, BQI ran the risk of a decision in the first forum to reach trial which would preclude a decision by the other court. BQI has had its day in court and the

Judgment rendered by the Superior Court of New Jersey is final and entitled to full faith and credit.

III

ENGLAND V. LOUISIANA MEDICAL EXAMINERS IS NOT A PRECEDENT IN THIS CASE.

BQI's reliance on the case of *England v. Louisiana Medical Examiners*, 375 U.S. 411 (1964), as support for its position that it may now relitigate issues tried and resolved in the parallel state court action, is misplaced. *England* was decided against the background of an entirely different situation, both procedurally and factually, than the case at bar.

In *England*, 40 graduates of chiropractic schools seeking to practice in Louisiana brought suit in federal District Court. The chiropractors argued that they should be permitted to practice without complying with the Louisiana Medical Practice Act and that this statute as applied to chiropractors violated the Fourteenth Amendment. The state courts of Louisiana had never addressed the issue of whether the Medical Practice Act did apply to chiropractors. The District Court, *sua sponte*, invoked the doctrine of abstention on the grounds that, should the state court determine that chiropractors were not covered by the Act, the controversy would terminate without need to address the constitutional issues. The District Court directed the chiropractors to submit this issue to the Louisiana courts and retained jurisdiction. The chiropractors thereupon brought a proceeding in state court which included not only the specific issue of whether the Act applied to chiropractors but also their contention that, if it did apply

to chiropractors, it violated the Fourteenth Amendment. The Louisiana courts held both that the Act did apply to chiropractors and that, as applied, it did not violate the Fourteenth Amendment. The chiropractors then returned to District Court for a determination by that court of their Fourteenth Amendment claims. The District Court held that, having submitted these claims to the Louisiana court, they were barred from relitigating them in federal court. When the case reached the Supreme Court, this Court enunciated a "bright line" test:

> [s]o that litigants shunted from federal to state courts *by application of the abstention doctrine* will not be exposed, not only to unusual expense and delay, but also to procedural traps operating to deprive them of their right to a District Court determination of their federal claims. . . . We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and had them decided there, then – whether or not he seeks direct review of the state decision in this court – he has elected to forego his right to return to the District Court. [emphasis added].

375 U.S. at 418-19. This Court specifically noted that, under the test it had just enunciated, the chiropractors would be barred from presenting their claims in federal court because they unreservedly litigated their federal claims in state court but declined to apply the new rule against them.

Thus, in *England*, the plaintiffs began their litigation in federal court but were forced into state court by the District Court's abstention order, which was issued *sua sponte*. This Court's reasoning in *England* was a logical

extension of the *Pullman* abstention doctrine which requires a federal court to abstain from exercising jurisdiction when the resolution of a vague issue of state law might either avoid or modify a constitutional issue. Under *Pullman*, the federal court stays proceedings while plaintiff seeks an authoritative state court interpretation of state law – ideally through a state certification procedure or by a declaratory judgment action in which the federal issues are reserved. *See Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1940).

In the case *sub judice*, BQI has, *of its own accord*, filed two separate but virtually identical lawsuits – this one in federal District Court and a parallel case in New Jersey state court. Further, this is not a situation where the federal court abstained from hearing BQI's claims contrary to Plaintiff's contention that the District Court's action in staying the pretrial conference because the parties were physically trying the state court case was a "*de facto* abstention." This Court *specifically* declined from abstaining or staying this action and the parties proceeded with discovery on both cases. BQI's assertion to this Court that there was an agreement that it was reserving its federal claims for federal court is untrue. BQI relies on a comment, taken out of context, made by defense counsel during oral argument in federal District Court on the abstention Motion as constituting an agreement that BQI was entitled to a second trial. While acknowledging that the District Court might one day have to reach the issue of whether any federal claims remained after disposition of the state action, Defendants certainly did not waive their right to seek a dismissal based on applicable law. "[I]f Plaintiff feels that there's

something that wasn't adequately and fairly dealt with in the State Court action, he can come back to Your Honor and *try to convince Your Honor* that in that point in time, there should be additional actions in the Federal Court." [emphasis added] (Ra-60a).

The policy reasons underlying *England* were to protect a plaintiff who sought federal jurisdiction from losing that jurisdiction through no action of his own because of the application of the abstention doctrine. *England* cannot be understood as sanctioning a result which would permit a plaintiff to bring two separate actions based on the same facts, one in state court and one in federal court, and to proceed to trial in each court. BQI invoked the jurisdiction of both courts; it did not limit its claims before the federal court to federal claims but also sought resolution of pendent state claims including, but not limited to, the validity of the Bernardsville Quarry ordinance, whether quarrying was a non-conforming use under state law and the extent of any such non-conforming use. Similarly, Count V of BQI's state court Complaint contains allegations that the Borough violated BQI's constitutional rights under both the New Jersey Constitution and the United States Constitution in violation of 42 U.S.C. § 1983. Plaintiff fairly litigated these claims before the state court and lost. BQI could have gotten complete relief in either forum but chose not to assert every claim in each action.

Unlike a plaintiff in an abstention situation, BQI in this case deliberately filed two lawsuits. BQI created its own dilemma – it was not shunted into state court by any action of the federal District Court. BQI further argued persuasively to the District Court that abstention was not

proper and that neither action should be stayed. BQI was in control of both lawsuits. The concerns raised by the court in *England* are not presented here because here the District Court did not require BQI to go into state court for the resolution of a preliminary issue. BQI voluntarily and clearly availed itself of the state forum. To permit *England* to extend beyond the abstention situation, where a litigant is *required* by the federal court to seek determinative rulings on state law from state courts, or beyond the situation where a clear and affirmative reservation is made in state court, would frustrate the harmonious relationship between state and federal courts. A plaintiff with a deep purse could bring two parallel lawsuits, as did BQI here, and try the same case twice. Here, BQI contends that it tried the constitutional taking issue only under the New Jersey Constitution, all the while intending to try the same taking issue in federal court under the United States Constitution. Since the New Jersey Supreme Court has held that the New Jersey Constitution provides even broader protection than the United States Constitution and that a taking under the Federal Constitution would always be a taking under the New Jersey Constitution as well, BQI is asking this Court, in effect, to overrule the decision of the state court that no taking occurred while the question is actually pending before the Supreme Court of New Jersey. Should this happen, the integrity of the New Jersey courts, in construing the protections afforded by their own Constitution, would be discredited. Additionally, BQI will have the opportunity to have two bites at the apple.[3] Abstention is a judicial

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[3] Now that Plaintiff has had an 11-week "dress rehearsal" before the New Jersey courts, Plaintiff would be in a good

(Continued on following page)

doctrine designed to promote harmony between the federal and state courts, not to destroy it. Permitting *England* to extend beyond its intended scope, where the federal court did not abstain or stay the state court proceedings and where Plaintiff voluntarily filed parallel lawsuits and unreservedly litigated federal claims in state court, would be totally unwarranted.

IV

EVEN WERE *ENGLAND V. LOUISIANA MEDICAL EXAMINERS* TO BE HELD APPLICABLE, PLAINTIFF DID NOT CLEARLY RESERVE ITS RIGHTS.

Although the Borough contends that *England* is totally inapplicable to the present situation, even were it to apply, BQI freely and without reservation submitted its federal claims for decision by the New Jersey courts, litigated them in the New Jersey courts and had them decided there. First, a review of Count V of BQI's state court Complaint clearly implicates federal claims and invokes jurisdiction of the state court over Plaintiff's federal claims. BQI alleges:

> 2. The foregoing resolution of the Borough Council denying Plaintiff's application for a

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(Continued from previous page)

position to try the taking issue again. Plaintiff has already indicated that it would produce additional expert testimony, perhaps being dissatisfied with the testimony adduced to date or with the manner or presentation. Perhaps Plaintiff wished to see if it could hit a home run on the taking issue in state court under the broader protection afforded by the New Jersey Constitution without incurring the expense of the additional experts or wished to see how the experts it hired performed.

> Quarry License is the culmination of a course of action consciously chosen by the Borough Council and its administrative offices to wrongfully deprive the Plaintiff of its property, rights and privileges and immunities secured by the Constitution and laws of the United States and State of New Jersey under the color of the statutes, ordinances and regulations of the State of New Jersey and its agencies and the Borough of Bernardsville in violation of 42 U.S.C. § 1983.

(Ra-18a).

The Pretrial Order entered in the state court action on October 7, 1988, is completely silent as to any reservation of federal issues. On the contrary, the nature of the case sets forth that, "Plaintiff also seeks damaged (sic) pursuant to 42 U.S.C. § 1983" (Ra-31a). The Pretrial Memorandum filed by BQI also indicated that BQI sought damages under 42 U.S.C. § 1983 in the state court action. BQI's Statement of Facts in its Trial Brief filed in the state court action describes the issues before the court as including "(e) for damages under § 1983 of the United States Code (Fifth Count)." BQI's state court Trial Brief further states, "The provision of the Quarry License Ordinance limiting the quarrying of the trap rock below the elevation of the railroad track has deprived plaintiff of its property without just compensation and is arbitrary, unreasonable and capricious" (Ra-35a). Admittedly, Point IX of BQI's Trial Brief discusses a taking without just compensation under the New Jersey Constitution; however, this is of no moment, since the New Jersey Constitution encompasses the protections of the United States Constitution and exceeds them. Moreover, Point XII of BQI's Trial Brief contends that, "Plaintiff is entitled to an award of damages, counsel fees and costs pursuant to 42

U.S.C. § 1983" (Ra-35a) and argues as a principle of law that, "It is well established that a municipality may be liable to a corporate landowner for damages sustained as a result of the deprivation of its property rights under color of state law in arbitrarily depriving it of those rights. *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328 (CA 5th 1981) . . . " (Ra-36a). Thus, were *England* applicable to the present case, not only did BQI fail to clearly reserve before the state court its right to litigate its civil rights claims in federal court, it fully and voluntarily litigated its civil rights claims before Judge Guterl. BQI's civil rights claims were included in every major pleading – the Complaint, BQI's Pretrial Memorandum which was incorporated into the Pretrial Order and BQI's Trial Brief. Judgment was entered in favor of the Borough on Count V (the civil rights claims under 42 U.S.C. § 1983) of Plaintiff's Complaint (Pa-19a). Only subsequent to trial, when Judge Guterl ruled in favor of the Borough as to the validity of the Quarry ordinance and as to lack of a compensatory taking, did BQI raise before the state court for the first time its present contention – that it had only tried the taking issue under the New Jersey Constitution and not under the United States Constitution. BQI's position is completely untenable. BQI tried its civil rights claims and lost and now seeks the opportunity to try them once again. This is most unfair, not only to the Borough, which has drained the public coffers to finance an expensive and lengthy defense of BQI's claims, but also to the Superior Court of New Jersey, which properly exercised the jurisdiction to hear BQI's civil rights claims, which was invoked *voluntarily* by BQI. Unlike an abstention situation where, in effect, a

preliminary issue of state law is resolved prior to the federal court's exercise of jurisdiction, more than preliminary matters pertaining to state law were determined by Judge Guterl in the 11 weeks of trial – the entire matter was resolved. If BQI now finds the verdict unsatisfactory, it has a remedy, to which it has already availed itself – an appeal through the New Jersey courts and ultimately to this Court, not a new trial on the same issues in District Court. BQI has had its day in court – no litigant is entitled to two.

CONCLUSION

For the foregoing reasons, Bernardsville Quarry, Inc.'s petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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APPENDIX 1

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: SOMERSET COUNTY
DOCKET NO. W27465-88-P.W.

BERNARDSVILLE QUARRY, INC., a New Jersey Corporation, Plaintiff,	Civil Action
vs.	COMPLAINT IN LIEU OF PREROGATIVE WRIT
BOROUGH OF BERNARDSVILLE, a municipal corporation, JOHN DOE and RICHARD ROE, unknown defendants, Defendants.	FILED MAY 25 1988

Plaintiff, BERNARDSVILLE QUARRY, INC., a corporation of the State of New Jersey, with its principal place of business at Stone House Road in the Township of Bernards, County of Somerset and State of New Jersey, says:

FIRST COUNT

1. Plaintiff, Bernardsville Quarry, Inc., is a corporation duly organized and existing under the laws of the State of New Jersey.

2. Plaintiff is the owner of a 110 acre tract of land located in the Borough of Bernardsville, Somerset County

and designated as Block 100, Lot 2 on the Official Tax Map of said Borough (the "Property").

3. The Property contains valuable reserves of high quality basalt, which due to hardness and stability is the only type of stone approved for road construction in New Jersey. A quarry may have been established on the Property as early as 1904.

4. Commencing in 1931, Anthony Ferrante developed the Property for the production of stone for his own use as a contractor and for sale to others. In 1935, Ferrante incorporated as Anthony Ferrante & Sons, Inc. (hereinafter "Ferrante") which took over the Ferrante contracting and quarrying operation. The operation consisted of stripping the overburden, drilling and blasting the exposed rock, crushing and screening the resulting stone product.

5. Ferrante also established a ready-mix concrete plant and a bituminous concrete plant on the Property which utilized the stone product for the manufacture of ready-mix and bituminous concrete.

6. The Borough of Bernardsville adopted its first Land Use Ordinance, No. 152, on December 19, 1949.

7. On April 24, 1963, a Final Judgment was entered in the Superior Court of New Jersey in the case of Somerset Crushed Stone, Inc., et al, plaintiffs, vs. Borough of Bernardsville, defendant, Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-7854-58, which adjudged and declared:

> " . . . the plaintiffs and their successors in ownership of the Quarry and Stripping Areas, delineated on the annexed Map Showing the

Boundaries of the Anthony Ferrante & Sons, Inc., Quarry and Stripping Areas, prepared by Herman H. Stege, dated March, 1963, have a non-conforming general quarry use of the quarry area shown on that Map and a non-conforming stripping use of the Stripping Area shown on the same Map, and have the right to continue such non-conforming quarry and stripping uses, in the defined areas, inclusive of all present and future uses normally accessory, auxiliary or incidental thereto, without prohibition or restraint by municipal zoning ordinance, except as modified by the stipulation of the plaintiffs recited in Paragraph 24 of the Findings of Fact, which are incorporated by reference herein;"

8. The Court made certain Findings of Fact as the basis for the aforesaid Judgment, *inter alia*:

"13. The rock formation of the quarry site consists of basalt trap rock formations, lying on the average between 3' to 30' from the surface, and penetrating to a depth of 150' or more to the present quarry floor and extending from the Erie Lackawanna Railroad tracks south at least to a line 300 feet north of Pill Hill Road. The trap rock section is separated from shale and sandstone deposits under the Stripping Area, so delineated on the Stege map defined in paragraph 24 of these Findings of Fact and received in evidence as Exhibit P-2, which area comprises the southwest corner of the property. The over burden of the entire tract consists of loose rock mixed with soil having the binding quality of clay. This product, removed by stripping, is in demand as a foundation course for highways and buildings.

14. The trap rock is of a superior quality, merchantable and in demand for road building, concrete aggregate, bituminous ready mix, rip rap, railroad bed, shore jetties and the like."

9. The Court specifically found in its Conclusions of Law:

"4. Plaintiffs and their successors in ownership have the right to continue such non-conforming quarry and stripping uses, without prohibition or restraint by municipal zoning ordinance, except as modified by plaintiffs stipulation, recited in Paragraph 24, of the Findings of Fact."

5. The non-conforming general quarry use and stripping uses include all present and future uses normally accessory, auxiliary or incidental thereto, except as modified by stipulation of the plaintiffs, recited in Paragraph 24 of the Findings of Fact."

10. The Stipulation in Paragraph 24 of the Findings of Fact provides:

"24. A map prepared by Herman H. Stege, dated March, 1963, entitled Map Showing the Boundaries of the Anthony Ferrante and Sons, Inc., Quarry and Stripping Areas, has been received in evidence as Exhibit P-2. The plaintiffs have stipulated, for the record, that if the Court finds that a currently effective, non conforming general quarry use has been established for the Quarry Area and a non-conforming stripping use has been established for the Stripping Area, each as shown on Exhibit P-2, Anthony Ferrante & Sons, Inc., for itself, its successors and assigns:

(a) Abandons all non-conforming quarry use of its property beyond the delineated Quarry Area;

(b) Will confine removal operations in the delineated Stripping Area to stripping, without blasting to a depth of 20 feet, but not below an elevation of 465 feet and will not use the delineated Stripping Area for storage or quarry materials, machines, trucks, debris, and the like;

(c) Within the delineated Quarry Area, plaintiffs will respect the buffer zone shown on the Stege Map, Exhibit P-2, and will confine their operations in buffer zones to uses permitted in buffer areas of an Industrial Zone as provided in Bernardsville Zoning ordinance No. 249, except that stripping, subject to the conditions in (b) above, may be conducted in the buffer along the boundary between the Quarry Area and the Stripping Area as shown on Exhibit P-2;

(d) Will not allow access to and from Pill Hill Road across its property for quarry and stripping truck traffic;

(e) Will fence the line of the Quarry Area as shown on Exhibit P-2 between the northeast corner of the Playground as shown on the same Exhibit and the New Jersey Power and Light Company, property, using a six-foot Cyclone wire fence bent out and also will plant hemlock or equal trees for screening of the same boundary;

(f) Will fence other, not otherwise protected, boundaries of the Quarry Area, as may be required by law, all within a reasonable time.

11. On March 2, 1987, plaintiff Bernardsville Quarry, Inc. ("BQI") was the successful bidder for the Property at a foreclosure sale conducted by the Sheriff of Somerset County. On March 13, 1987, BQI paid the bid price of $3,825,000 and received a deed of conveyance from the

Sheriff of Somerset County, which is recorded in Book 1621 of Deeds for Somerset County, page 298 &c.

12. Plaintiff had investigated the quantities and quality of quarry stone located in the Quarry and Stripping Zones prior to purchasing the Property and purchased it for the operation of a quarry.

13. By letter dated March 5, 1987, BQI was required by Paul J. Passaro, Jr., Borough Administrator/Engineer/Construction Official to apply for:

(a) A "Continued Certificate of Occupancy and Use";

(b) A detailed site plan and application for site plan review to the Planning Board prior to the commencement of *any operation at this site;* (Emphasis added)

(c) Establish there are no New Jersey DEP, Division of Water Resources, nor ECRA violations which would prohibit the issuance of a Continued Certificate of Occupancy.

14. The Borough's Development Regulations Ordinance 1979 (Ord. No. 581) requires in general terms that a certificate of occupancy is required for a change of ownership or occupancy of nonresidential building or structure. (Art. 12-3.2). The Borough has adopted the Uniform Construction Code, which sets forth the specific requirements for a Continued Certificate of Occupancy. ("CCO"):

> "(c) Existing buildings: Upon request of the owner of an existing building or structure, the construction official, with the approval of the subcode officials, shall issue a certificate of

> continued occupancy provided that there are not violations of law or orders of the construction official pending and it is established after inspection and investigation of available municipal records that the alleged use of the building or structure has lawfully existed. The certificate of continued occupancy shall evidence only that a general inspection of the visible parts of the building has been made, and that no violations of *N.J.A.C.* 5:23-2.14 have been determined to have occurred and no unsafe conditions violative of *N.J.A.C.* 5:23-2.32(a) have been found. . . . Nothing in this subsection shall prevent the continued lawful use and occupancy of any such lawfully existing building or structure." (*N.J.A.C.* 5:23-2.23).

15. There is no requirement for site plan approval, New Jersey D.E.P., Division of Water Resources nor ECRA approvals as a condition to the issuance of a CCO. Plaintiff was entitled to a CCO for the operation of the quarry, the stone crushing plant, the ready-mix and bituminous concrete plants as nonconforming uses.

16. On March 10, 1987, BQI filed an application for a CCO with defendant Borough for use as a quarry, including the processing of stone products.

17. On March 11, 1987, the Borough rejected the application for a CCO as insufficient, viz:

> "I've discussed your application for a certificate of occupancy for the Bernardsville Quarry with both the Borough Attorney and Construction Official, and have been advised as follows.
>
> Your request for a continued certificate of occupancy to continue a prior use is insufficient as submitted since the only current use of which we are aware is a concrete plant. We must insist

upon a site plan (as per Mr. Passaro's letter of March 5, 1987 attached hereto) with descriptions and extent of the proposed uses including appropriate maps and other data." (Letter March 11, 1987, Mondok to BQI).

18. On March 23, 1987, in an effort to cooperate with the Borough, plaintiff's representatives met with a subcommittee of the Borough Council to describe its plans for cleaning up the quarry property and operation of the quarry business. The Borough finally issued Temporary Certificates of Occupancy for the bituminous concrete plant. It began to escalate its requirements for a CCO to operate the Quarry. (Letter August 4, 1987 Macdowell to BQI and attachments).

19. In the interim, the defendant Borough introduced a Quarry License Ordinance, which was adopted on July 20, 1987 (the "Ordinance"). The Ordinance contained various provisions which plaintiff contends are illegal. Defendant Borough adopted a Resolution extending plaintiff's time to challenge the validity of the Ordinance so that the parties might resolve the disputed provisions during the Quarry License Application Process.

20. Plaintiff engaged several consultants to study and report on various alleged environmental concerns raised by defendant Borough, which study required substantial expenditures of time and monies by plaintiff.

21. On February 29, 1988, plaintiff submitted a detailed Application (the "Application") for a quarry license with supporting reports and exhibits. The Application satisfied all of the requirements of the Quarry License Ordinance.

22. On April 11, 1988, the Mayor and Council of defendant Borough adopted a Resolution denying the Application "without prejudiced" (sic).

23. The defendant Borough adopted said Resolution:

(a) Allegedly on the basis of written reports of its own experts which were not made available at the public hearing, thereby depriving plaintiff of due process of law;

(b) Said reports have still not been supplied to plaintiff though the Resolution so provides and plaintiff has requested them;

(c) The "findings" in the Resolution are contrary to the evidence in the Application, are no longer true in some cases, and are unsupported by any materials allegedly considered by the Council;

(d) The Resolution is ultra vires the authority of the Borough Council in attempting to administer laws and regulations delegated by the Legislature to the New Jersey Department of Environmental Protection;

(e) The Resolution is ultra vires the authority of the Borough Council in limiting plaintiff's right to quarry on proof of geological and hydrological data which are not required by the Ordinance.

(f) The Resolution is so vague as to fail to provide plaintiffs with the ability to supply the information requested.

(g) The defendant Borough did not provide plaintiff with an opportunity to be heard or to discuss

modifications of its application which would satisfy the alleged concerns of the Borough.

23. The denial of the Application by defendant Borough was arbitrary, unreasonable and capricious, ultra vires the powers of the Borough Council under the Ordinance and deprived the plaintiff of its property without due process and without just compensation in violation of its rights under the New Jersey Constitution.

WHEREFORE, plaintiff Bernardsville Quarry, Inc. demands judgment against defendant Borough of Bernardsville:

(a) Ordering and directing the issuance of a Continued Certificate of Occupancy to permit the operation of the quarry and the processing of stone products;

(b) Ordering and directing the issuance of a Quarry License Ordinance to plaintiff;

(c) Such other relief as shall be equitable and just.

SECOND COUNT

Invalidity of Depth of Excavation Limitation

1. Plaintiff repeats the allegations of the First Count and makes the same a part hereof.

2. The principal value of the Property is its stone reserves which extend to depths of 250 feet below the ground level of the adjacent railroad right-of-way.

3. Plaintiff's predecessor expended substantial funds to create quarry faces below ground elevation to mine this stone, and removed substantial quantities prior

to the adoption of the first Zoning Ordinance in the Borough on 19, 1949 [sic], and did thereby establish a nonconforming use to quarry below the adjacent ground level.

4. The 1963 Judgment did not attempt to limit the depth of quarrying on the Property.

5. The Quarry License Ordinance provides, in part:

> "e. No quarrying shall be permitted which will reduce the quarried area below the lowest grade of adjoining properties, roads, or railroad line; nor shall any quarrying be permitted which will endanger the lateral support of abutting properties. In the event quarrying or excavation should result in face slopes in excess of 45 degrees, a minimum leveled (or natural) buffer area of 50 feet shall be provided between any quarry boundary line and the commencement of the slope."

6. The foregoing provision is arbitrary and unreasonable in that the lowest grade of adjoining properties are at elevations ranging from 500 feet to 345 feet, that plaintiff has a right as a nonconforming use to quarry below these levels, that the quarry excavation when completed is designed to create a lake which will rehabilitate the site and make it usable for other uses of benefit to the plaintiff and to the public and said provision deprives the plaintiff of its property, including valuable stone reserves without due process and without just compensation in violation of the New Jersey Constitution.

WHEREFORE, plaintiff demands judgment against defendant Borough adjudging and declaring:

(a) That §9(e) of the ordinance is invalid;

(b) That plaintiff has a pre-existing nonconforming use which entitles it to quarry stone to a depth of 75 feet above sea level.

THIRD COUNT

Invalidity of Other Ordinance Provisions

1. Plaintiff repeats the allegations of the First Count and makes the same a part hereof.

2. The Ordinance provisions hereinafter listed are invalid for the reasons stated following each quoted section:

> "A. *Section No. 4(d)-35).* An aerial photograph on the original application for a license * * * buffer zones. The Borough Engineer may request additional aerial flyovers during the course of an operating year. Applications for renewal of the license shall include certification by a professional engineer as to the existing quarry faces, the quarry boundaries and buffer zones. Updated aerial photographs may be required at the end of each five year period of operation.
>
> *Reason*: The cost of an aerial photograph to accurately establish topographical characteristics is approximately $10,000 based on current cost and is an unnecessary and unreasonable expense on an annual basis.
>
> B. *Section No. 4(e).* An environmental impact statement shall be submitted covering in detail the following areas:
>
> *Reason*: There is no good reason to require an updated environmental impact statement on each application for renewal of the license since

all of the essential material will have been provided in the initial environmental impact statement. Inspections by the Borough Engineer will insure compliance with the various aspects of the environmental impact statement.

C. *Section 5(a)* requires slopes not steeper than two feet horizontal to one foot vertical on completion of quarrying. The Ordinance should provide: "slopes shall be as approved by the Planning Board reviewing the plan for rehabilitation with due consideration to the topography of the site on the date of adoption of the within ordinance."

Reason: The reason for the change is that the property has already been quarried prior to the adoption of the ordinance. A two to one slope in many areas would be impossible in view of the present condition of the site. The Mine Safety Section of the Department of Labor and Industry of the State of New Jersey requires vertical working faces. It is not feasible to quarry leaving a two to one slope. Most of the quarry site will be a lake upon completion and the remaining areas shall be graded off as approved by the Planning Board on the rehabilitation plan.

D. *Section 7*. Fees. Requires on application fee of $12,000. The fee is excessive.

E. *Section 9*. Regulation of Operation.

a. Quarrying may be conducted only from Monday through Saturday between the hours of 7:00 a.m. and 5:00 p.m., prevailing time with the exception that office administration and maintenance for equipment other than motor vehicles may be conducted at any time. Maintenance of on-site motor vehicles may be conducted until 7:00 p.m.

1. Quarrying shall not be conducted for a period of time in excess of nine (9) gross hours per day, and

2. The site of quarry materials, and the trucking of same shall be permitted Monday through Saturday between the hours of 7:00 a.m. and 5:00 p.m. prevailing time.

Reason: A municipality does not have the right to limit the hours that a business may operate unless expressly so authorized by the Legislature. Plaintiff cannot compete with competitors in other municipalities who may start earlier and be able to deliver construction materials to the job site at the beginning of the work day while plaintiff cannot, thereby constituting an unreasonable restraint on intrastate and interstate commerce.

F. Section 9(h) purports to regulate plaintiff's blasting which subject has been pre-empted by the provisions of N.J.S.A. 21:1A-139 which grants the exclusive power to regulate the use of explosives to the Commissioner of Labor and Industry of the State of New Jersey.

3. The foregoing provisions of the Ordinance are invalid, ultra vires, arbitrary, unreasonable and capricious and should be declared null and void.

WHEREFORE, plaintiff Bernardsville Quarry, Inc. demands judgment declaring §§4(d)35, 4(e), 5(a), 7, 9 and 9(h) invalid and unenforceable.

FOURTH COUNT

Nuisance

1. Plaintiff repeats the allegations of the First Count and makes the same a part hereof.

2. Defendant Borough has an obligation to protect the public health, welfare and safety and to protect property values within the Borough.

3. In violation of that duty, the Borough of Bernardsville, acting through its Borough Council and administrative officers, have negligently or intentionally failed to enforce the laws, ordinances and regulations which are delegated to their charge, and has:

(a) Permitted Ferrante to establish an illegal sanitary landfill on the Property;

(b) Permitted C. Forgione & Sons, Inc., A. Mazzochi & Sons, Inc. and Land Recovery, Inc. to transport and dump thousands of truckloads of stumps, building debris and other refuse on the Property allegedly resulting in pollution of the groundwater supply;

(c) Failed and refused to enforce judgments against Land Recovery, Inc. and C. Forgione & Sons, Inc. obtained in its Municipal Court which required the removal of said unlawful landfill materials.

(d) Permitted C. Forgione & Sons, Inc. to establish and operate a garbage transfer station on the Property without site plan approval, without approvals from the Bureau of Solid Waste and in violation of its own ordinances;

(e) Permitted Ferrante to remove hundreds of truckloads of soil from the site thereby making reclamation of the site upon completion of quarry operations prohibitively expensive.

(f) Used Borough trucks and equipment to transport sludge from the Borough sewage treatment plant and bury it upon the Property in violation of law.

4. The Borough of Bernardsville did thereby aid and abet in the creation of an unlawful sanitary landfill which constituted a public and private nuisance.

5. Plaintiff, as the subsequent owner of the Property, has expended substantial sums of money to abate said nuisance by removing the stumps, building debris and refuse as required by the Judgments of the Municipal Court of the Borough of Bernardsville.

6. Defendant Borough and its unknown employees, John Doe and Richard Roe, are liable to plaintiff for the costs incurred by plaintiff in abating said nuisance, including labor, equipment, trucking, tipping fees at licensed landfills, consultant's fees and all other reasonable expenses, together with the reasonable value of the loss of use of the Property, and loss of income therefrom.

7. Since plaintiff has acquired the Property, the Borough has engaged in a concerted effort to prevent the plaintiff from cleaning up the Property and abating the aforesaid public and private nuisance, and to prevent the operation of the quarry, including the following:

(a) Forbidding plaintiff from blasting because of the presence of asbestos at remote distances from the quarry face;

(b) Prohibiting the removal of the asbestos;

(c) Forbidding the removal of the building debris which its own Municipal Court ordered removed by others;

(d) Stopping and searching trucks engaged in removal of building debris without probable cause in violation of plaintiff's Fourth Amendment rights under the United States Constitution and impounding said vehicles;

(e) Filing groundless complaints in the Municipal Court to enforce regulations of the Department of Environmental Protection;

(f) Causing to be published false or distorted information about plaintiff in local newspapers.

8. The foregoing actions by defendant Borough have interferred with plaintiff's business resulting in loss of income and, if continued, will cause damages for which plaintiff's remedy at law is inadequate.

WHEREFORE, plaintiff, Bernardsville Quarry, Inc., demands judgment against the Borough of Bernardsville for:

(a) Compensatory damages, reasonable attorney's fees and costs of suit;

(b) Injunctive relief restraining and enjoining defendant Borough, its municipal officers and employees from unlawfully interfering with plaintiff's operation of its quarry business.

FIFTH COUNT

§1983 Claim

1. Plaintiff repeats the allegations of the First Count and makes the same a part hereof.

2. The foregoing Resolution of the Borough Council denying plaintiff's application for a Quarry License is the culmination of a course of action consciously chosen by the Borough Council and its administrative officers to wrongfully deprive the plaintiff of its Property, rights, privileges and immunities secured by the Constitution and laws of the United States and of the State of New Jersey under color of the statutes, ordinances and regulations of the State of New Jersey and its agencies and the Borough of Bernardsville in violation of 42 *U.S.C.* §1983.

3. As the direct and proximate result of the foregoing wrongful acts of defendant Borough, the plaintiff has been prevented from operating the quarry, including blasting of stone, has been deprived of or prevented from excavating valuable stone reserved [sic] causing plaintiff to lose revenues from operations to its pecuniary damage.

WHEREFORE, plaintiff Bernardsville Quarry, Inc. demands judgment against the Borough of Bernardsville and its unknown employees, John Doe and Richard Roe, for compensatory damages, reasonable attorney's fees and costs of suit.

SCHENCK, PRICE, SMITH & KING
Attorneys for Plaintiff

By /s/ Clifford W. Starrett
Clifford W. Starrett

DATED: May 24, 1988

CERTIFICATION

Certification pursuant to *Rule* 4:5-1. It is hereby certified that the matter in controversy is not the subject of any other action pending in any court or of a pending arbitration proceeding nor is any other action or arbitration proceeding contemplated except that plaintiff is instituting suit in the United States District Court against the defendant alleging violations of its rights under the United States Constitution.

SCHENCK, PRICE, SMITH & KING
Attorneys for Plaintiff

By /s/ Clifford W. Starrett
Clifford W. Starrett

APPENDIX 2

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BERNARDSVILLE QUARRY, INC., a New Jersey Corporation, Plaintiff,	:	Civil Action COMPLAINT Filed
vs.	:	May 31, 1988
BOROUGH OF BERNARDSVILLE, a municipal corporation, Defendants.	:	

Plaintiff, BERNARDSVILLE QUARRY, INC., a corporation of the State of New Jersey, with its principal place of business at Stone House Road in the Township of Bernards, County of Somerset and State of New Jersey, says:

JURISDICTION

Jurisdiction is vested in this Court of this civil action pursuant to 28 *U.S.C.* §1331(a) which action arises under the Constitution of the United States involving the taking of plaintiff's property, property rights and interest without due process and without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. The matter in controversy exceeds the value of $10,000, exclusive of interest and costs.

VENUE

The venue of this civil action lies in the District Court for the District of New Jersey pursuant to 28 *U.S.C.* §1391.

FIRST COUNT

1. Plaintiff, Bernardsville Quarry, Inc., is a corporation duly organized and existing under the laws of the State of New Jersey. Defendant, Borough of Bernardsville, is a municipal corporation of the State of New Jersey.

2. Plaintiff is the owner of a 110 acre tract of land located in the Borough of Bernardsville, Somerset County and designated as Block 100, Lot 2 on the Official Tax Map of said Borough (the "Property").

3. The Property contains valuable reserves of high quality basalt, which due to hardness and stability is the only type of stone approved for road construction in New Jersey. A quarry may have been established on the Property as early as 1904.

4. Commencing in 1931, Anthony Ferrante developed the Property for the production of stone for his own use as a contractor and for sale to others. In 1935, Ferrante incorporated as Anthony Ferrante & Sons, Inc. which took over the Ferrante contracting and quarrying operation. Somerset Crushed Stone, Inc. was an affiliated operating company of Anthony Ferrante & Son, Inc. (Both are hereinafter referred to as "Ferrante"). The operation consisted of stripping the overburden, drilling and blasting the exposed rock, crushing and screening the resulting stone product.

5. Ferrante also established a ready-mix concrete plant and a bituminous concrete plant on the Property which utilized the stone product for the manufacture of ready-mix and bituminous concrete.

6. The Borough of Bernardsville adopted its first Land Use Ordinance, No. 152, on December 19, 1949.

7. On April 24, 1963, a Final Judgment was entered in the Superior Court of New Jersey in the case of Somerset Crushed Stone, Inc., et al, plaintiffs, vs. Borough of Bernardsville, defendant, Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-7854-58, which adjudged and declared:

> " . . . the plaintiffs and their successors in ownership of the Quarry and Stripping Areas, delineated on the annexed Map Showing the Boundaries of the Anthony Ferrante & Sons, Inc., Quarry and Stripping Areas, prepared by Herman H. Stege, dated March, 1963, have a non-conforming general quarry use of the quarry area shown on that Map and a non-conforming stripping use of the Stripping Area shown on the same Map, and have the right to continue such non-conforming quarry and stripping uses, in the defined areas, inclusive of all present and future uses normally accessory, auxiliary or incidental thereto, without prohibition or restraint by municipal zoning ordinance, except as modified by the stipulation of the plaintiffs recited in Paragraph 24 of the Findings of Fact, which are incorporated by reference herein;"

8. The Court made certain Findings of Fact as the basis for the aforesaid Judgment, *inter alia*:

> "13. The rock formation of the quarry site consists of basalt trap rock formations, lying on the

average between 3' to 30' from the surface, and penetrating to a depth of 150' or more to the present quarry floor and extending from the Erie Lackawanna Railroad tracks south at least to a line 300 feet north of Pill Hill Road. The trap rock section is separated from shale and sandstone deposits under the Stripping Area, so delineated on the Stege map defined in paragraph 24 of these Findings of Fact and received in evidence as Exhibit P-2, which area comprises the southwest corner of the property. The over burden of the entire tract consists of loose rock mixed with soil having the binding quality of clay. This product, removed by stripping, is in demand as a foundation course for highways and buildings.

14. The trap rock is of a superior quality, merchantable and in demand for road building, concrete aggregate, bituminous ready mix, rip rap, railroad bed, shore jetties and the like."

9. The Court specifically found in its Conclusions of Law:

"4. Plaintiffs and their successors in ownership have the right to continue such non-conforming quarry and stripping uses, without prohibition or restraint by municipal zoning ordinance, except as modified by plaintiffs stipulation, recited in Paragraph 24, of the Findings of Fact."

5. The non-conforming general quarry use and stripping uses include all present and future uses normally accessory, auxiliary or incidental thereto, except as modified by stipulation of the plaintiffs, recited in Paragraph 24 of the Findings of Fact."

10. The Stipulation in Paragraph 24 of the Findings of Fact provides:

"24. A map prepared by Herman H. Stege, dated March, 1963, entitled Map Showing the Boundaries of the Anthony Ferrante and Sons, Inc., Quarry and Stripping Areas, has been received in evidence as Exhibit P-2. The plaintiffs have stipulated, for the record, that if the Court finds that a currently effective, non conforming general quarry use has been established for the Quarry Area and a non-conforming stripping use has been established for the Stripping Area, each as shown on Exhibit P-2, Anthony Ferrante & Sons, Inc., for itself, its successors and assigns:

(a) Abandons all non-conforming quarry use of its property beyond the delineated Quarry Area;

(b) Will confine removal operations in the delineated Stripping Area to stripping, without blasting to a depth of 20 feet, but not below an elevation of 465 feet and will not use the delineated Stripping Area for storage or quarry materials, machines, trucks, debris, and the like;

(c) Within the delineated Quarry Area, plaintiffs will respect the buffer zone shown on the Stege Map, Exhibit P-2, and will confine their operations in buffer zones to uses permitted in buffer areas of an Industrial Zone as provided in Bernardsville Zoning ordinance No. 249, except that stripping, subject to the conditions in (b) above, may be conducted in the buffer along the boundary between the Quarry Area and the Stripping Area as shown on Exhibit P-2;

(d) Will not allow access to and from Pill Hill Road across its property for quarry and stripping truck traffic;

(e) Will fence the line of the Quarry Area as shown on Exhibit P-2 between the northeast

corner of the Playground as shown on the same Exhibit and the New Jersey Power and Light Company, property, using a six-foot Cyclone wire fence bent out and also will plant hemlock or equal trees for screening of the same boundary;

(f) Will fence other, not otherwise protected, boundaries of the Quarry Area, as may be required by law, all within a reasonable time.

11. On March 2, 1987, plaintiff Bernardsville Quarry, Inc. ("BQI") was the successful bidder for the Property at a foreclosure sale conducted by the Sheriff of Somerset County. On March 13, 1987, BQI paid the bid price of $3,825,000 and received a deed of conveyance from the Sheriff of Somerset County, which is recorded in Book 1621 of Deeds for Somerset County, page 298 &c.

12. Plaintiff had investigated the quantities and quality of quarry stone located in the Quarry and Stripping Zones prior to purchasing the Property and purchased it for the operation of a quarry.

13. By letter dated March 5, 1987, BQI was required by Paul J. Passaro, Jr., Borough Administrator/Engineer/Construction Official to apply for:

(a) A "Continued Certificate of Occupancy and Use";

(b) A detailed site plan and application for site plan review to the Planning Board prior to the commencement of *any operation at this site;* (Emphasis added)

(c) Establish there are no New Jersey DEP, Division of Water Resources, nor ECRA violations which

would prohibit the issuance of a Continued Certificate of Occupancy.

14. The Borough's Development Regulations Ordinance 1979 (Ord. No. 581) requires in general terms that a certificate of occupancy is required for a change of ownership or occupancy of nonresidential building or structure. (Art. 12-3.2). The Borough has adopted the Uniform Construction Code, which sets forth the specific requirements for a Continued Certificate of Occupancy. ("CCO"):

> "(c) Existing buildings: Upon request of the owner of an existing building or structure, the construction official, with the approval of the subcode officials, shall issue a certificate of continued occupancy provided that there are not violations of law or orders of the construction official pending and it is established after inspection and investigation of available municipal records that the alleged use of the building or structure has lawfully existed. The certificate of continued occupancy shall evidence only that a general inspection of the visible parts of the building has been made, and that no violations of *N.J.A.C.* 5:23-2.14 have been determined to have occurred and no unsafe conditions violative of *N.J.A.C.* 5:23-2.32(a) have been found. . . . Nothing in this subsection shall prevent the continued lawful use and occupancy of any such lawfully existing building or structure." (*N.J.A.C.* 5:23-2.23).

15. There is no requirement for site plan approval, New Jersey D.E.P., Division of Water Resources nor ECRA approvals as a condition to the issuance of a CCO. Plaintiff was entitled to a CCO for the operation of the quarry, the stone crushing plant, the ready-mix and bituminous concrete plants as nonconforming uses.

16. On March 10, 1987, BQI filed an application for a CCO with defendant Borough for use as a quarry, including the processing of stone products.

17. On March 11, 1987, the Borough rejected the application for a CCO as insufficient, viz:

> "I've discussed your application for a certificate of occupancy for the Bernardsville Quarry with both the Borough Attorney and Construction Official, and have been advised as follows.
>
> Your request for a continued certificate of occupancy to continue a prior use is insufficient as submitted since the only current use of which we are aware is a concrete plant. We must insist upon a site plan (as per Mr. Passaro's letter of March 5, 1987 attached hereto) with descriptions and extent of the proposed uses including appropriate maps and other data." (Letter March 11, 1987, Mondok to BQI).

18. On March 23, 1987, in an effort to cooperate with the Borough, plaintiff's representatives met with a subcommittee of the Borough Council to describe its plans for cleaning up the quarry property and operation of the quarry business. The Borough finally issued Temporary Certificates of Occupancy for the bituminous concrete plant. It began to escalate its requirements for a CCO to operate the Quarry. (Letter August 4, 1987 Macdowell to BQI and attachments).

19. In the interim, the defendant Borough introduced a Quarry License Ordinance, which was adopted on July 20, 1987 (the "Ordinance"). The Ordinance contained various provisions which plaintiff contends are

illegal. Defendant Borough adopted a Resolution extending plaintiff's time to challenge the validity of the Ordinance so that the parties might resolve the disputed provisions during the Quarry License Application Process.

20. The principal value of the Property is its stone reserves which extended to depths of 250 feet below the ground level of the adjacent railroad right-of-way.

21. Plaintiff's predecessor expended substantial funds to create quarry faces below ground elevation to mine this stone, and removed substantial quantities prior to the adoption of the first Zoning Ordinance in the Borough on 19, 1949 [sic], and did thereby establish a nonconforming use to quarry below the adjacent ground level.

22. The 1963 Judgment did not attempt to limit the depth of quarrying on the Property.

5. The Quarry License Ordinance provides, in part:

> "e. No quarrying shall be permitted which will reduce the quarried area below the lowest grade of adjoining properties, roads, or railroad line; nor shall any quarrying be permitted which will endanger the lateral support of abutting properties. In the event quarrying or excavation should result in face slopes in excess of 45 degrees, a minimum leveled (or natural) buffer area of 50 feet shall be provided between any quarry boundary line and the commencement of the slope."

23. The foregoing provision is arbitrary and unreasonable in that the lowest grade of adjoining properties are at elevations ranging from 500 feet to 345 feet, that plaintiff has a right as a nonconforming use to quarry

below these levels, that the quarry excavation when completed is designed to create a lake which will rehabilitate the site and make it usable for other uses of benefit to the plaintiff and to the public and said provision deprives the plaintiff of its property, including valuable stone reserves without due process and without just compensation in violation of the First and Fourteenth Amendment of the Constitution of the United States.

WHEREFORE, plaintiff demands judgment against defendant Borough adjudging and declaring:

(a) That §9(e) of the ordinance is invalid;

(b) That plaintiff has a pre-existing nonconforming use which entitles it to quarry stone to a depth of 75 feet above sea level.

SECOND COUNT

§1983 Claim

1. Plaintiff repeats the allegations of the First Count and makes the same a part hereof.

2. The foregoing Resolution of the Borough Council denying plaintiff's Application for a Quarry License is the culmination of a course of action consciously chosen by the Borough Council and its administrative officers to wrongfully deprive the plaintiff of its Property, rights, privileges and immunities secured by the Constitution and laws of the United States under color of law in violation of 42 *U.S.C.* §1983.

3. As the direct and proximate result of the foregoing wrongful acts of defendant Borough, the plaintiff has been prevented from operating the quarry, including

blasting of stone, has been deprived of or prevented from excavating valuable stone reserved [sic] causing plaintiff to lose revenues from operations to its pecuniary damage.

WHEREFORE, plaintiff Bernardsville Quarry, Inc. damands judgment against the Borough of Bernardsville for compensatory damages, reasonable attorney's fees and costs of suit.

SCHENCK, PRICE, SMITH & KING
Attorneys for Plaintiff

By /s/ Clifford W. Starrett
Clifford W. Starrett
10 Washington Street
Morristown, N.J. 07960
(201) 539-1000

DATED: May 25, 1988

APPENDIX 3

COURT, SOMERSET COUNTY, LAW DIVISION

BERNARDSVILLE, QUARRY, INC., a New Jersey corporation, Plaintiff, vs. BOROUGH OF BERNARDSVILLE, a municipal corporation, JOHN DOE and RICHARD ROE, unknown defendants, Defendants.	PRETRIAL ORDER Pretried By Judge LEONARD N. ARNOLD, J.S.C. on October 7, 1988 Superior No. L – W_27465-88PW County No. C – FILED Oct 7 88

The parties to this action, by their attorneys, having appeared before the Court at a pretrial conference on the above date, the following action was taken:

1. Action in lieu of prerogative writ challenging denial of continuance of Certificate of occupancy of quarry license; challenging portion ofquarry [sic] license ordinance regarding depth of operation.; challenging other provisions of quarry license; claiming that the Boro [sic] participated in the creation of a nuisance on Plaintiff's property. Plaintiff also seekds [sic] damaged [sic] pursuant to 42U.S.C. [sic] Section 1983. Defendant has counterclaimed for injunctive relief. Defendant seeks damages and attornies [sic] fees. Final

2. Final judgment entered April 24, 1963 in the case of Somerset Crsuhed [sic] Stone, Inc. et a [sic] vs Borough of Bernardsville, ?Dkt. [sic] No. L-7854-58.

3.&$. [sic] See attached.

5. Plaintiff seeks damages for lost profits – loss of potential profits. Out of pocket costs and loss of value of fifteen million tons of stone reserves in ground. Defendant seeks counsel fees.

6. None.

7. A. Was ARe [sic] the challenge portionsof [sic] the quarry ordiance [sic] a proper exercise of police power.

   B. Was denial of Plaintiff' sapplication [sic] for a quary [sic] license arbitrary, unreasonable and capricious.

   C. Does the Borough have the legal authority to regulate blasting or is such authority preempted by State law.

   E. Is plaintiff entitled to a quarry license by virtue of being a nonconforming use.

   F. Did the depth of excavation prior to the adoption of the ordinance establish a nonconforming use to that depth.

   G. Did cessation of operations in 1985 terminate nonconforming use.

   H. Has plaintiff been deprive [sic] of its property without just compensation.

   I. Is plaintiff entitled to a full hearing before the Borough Council.

   J. Does the condition of plaitifff's [sic] propety [sic] constitute a public nuisance.

   K. Are various provisionos [sic] fo [sic] the ordinance regarding slopes, aerial photograpsh [sic], licensing fees, hours of operation prempted [sic] by the Explosives Act, or otherwise unreasonable.

   L. Does Borough have [sic] right to make a public nuisance.

   M. May Borough requrie [sic] plaintiff to remove hazardous materials.

N. Is Borough entitled to an award of counsel fees.

8. None.

9. None.

10. No limit. Counsel will exchange reports no later than 10 days before trial.

11. Plaintiff's brief due December5 [sic], 1988.
Defendant's brief due January 6, 1989.

12. Usual.

13. None.

14. Clifford W. Starrett, Esq. for Plaintiff.
Dennis Alan Cipriano, Esq. and Richard P. Cushing, Esq. for Defendant.

15. Two to three weeks.

16. To be set by the Court.

17. No other matters agreed upon.

/s/ Leonard N. Arnold
HONORABLE
LEONARD N. ARNOLD, J.S.C.

/s/ Clifford W. Starrett
CLIFFORD W. STARRETT, ESQ.
For the Plaintiff

/s/ Dennis Alan Cipriano
DENNIS ALAN CIPRIANO, ESQ.
and

/s/ Richard P. Cushing
RICHARD P. CUSHING, ESQ.
For the Defendant.

APPENDIX 4

STATEMENT OF FACTS

This is a civil action in lieu of prerogative writ by Bernardsville Quarry, Inc. (BQI): (a) appealing from the denial of a continuing certificate of occupancy (CCO) and a quarry license by the Borough Council of the Borough of Bernardsville (First Count), (b) challenging the validity of that portion of the quarry license ordinance which limits the depth of operation (Second Count), (c) challenging certain other provisions of the quarry license ordinance (Third Count), (d) claiming the Borough participated in the creation of a nuisance on plaintiff's property (Fourth Count) and (e) for damages under §1983 of the United States Code (Fifth Count).

Plaintiff Bernardsville Quarry, Inc. is a New Jersey corporation. On March 2, 1987, it was the successful bidder for the former Ferrante Quarry at a foreclosure sale.

The Property contains valuable reserves of high quality basalt, which, due to hardness and stability, is the only type of stone approved for road construction in New Jersey. A quarry may have been established on the Property as early as 1904.

* * *

As a direct result of defendant's unlawful acts under color of law, plaintiff has been deprived of its right to operate a legitimate business for which it has expended over $6,000,000.00. It has lost business opportunities to sell its stone products from the denial of its application for a Certificate of Occupancy to blast on July 20, 1987 to date.

The business which plaintiff purchased in the reasonable expectation of continuing to mine and sell trap rock and other construction materials manufactured from the trap rock has a fair market value of $34,500,000.00 as a going business. The provision of the Quarry License Ordinance limiting the quarrying of the trap rock below the elevation of the railroad track has deprived plaintiff of its property without just compensation and is arbitrary, unreasonable and capricious.

* * *

POINT XII

PLAINTIFF IS ENTITLED TO AN AWARD OF DAMAGES, COUNSEL FEES AND COSTS PURSUANT TO 42 U.S.C. §1983.

Plaintiff has been prevented from operating its quarry business since July 20, 1987 by the refusal of the Borough to issue a Certificate of Occupancy to permit blasting of rock and by the adoption of a Quarry Licensing Ordinance which forbade quarrying without a quarry license. The requirement for a quarry license was *ultra vires* (Point IV) and the denial of a quarry license was illegally determined in violation of the Open Public Meetings Law (Point VII) and arbitrarily denied (Point VIII).

The Civil Rights Act of 1871 provides in part:

§1983. Civil Action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

It is well established that a municipality may be liable to a corporate landowner for damages sustained as a result of the deprivation of its property rights under color of state law in arbitrarily depriving it of those rights. *Deerfield Med. Center v. City of Deerfield Beach,* 661 *F.2d* 328 (CA 5th 1981) (abortion clinic excluded from commercial zone). The unlawful deprivation of a license to operate a business and the arbitrary interference with that right in refusing to issue the license constitutes a deprivation of a federally protected constitutional right under §1983. *Sanderson v. Village of Green Hills,* 726 *F.2d* 284 (6th Cir. 1984) (billiard parlor). *Minneapolis Auto Parts Co., Inc. v. City of Minneapolis,* 739 – *F.2d* 408 (8th Cir. 1984) (recognized by implication of remand).

Plaintiff has been deprived of a loss of sales during the last half of 1987 and the entire year of 1988. Its losses will continue into 1989 as demonstrated by a pro forma prepared by its financial officer.

The basic purpose of a damages award under §1983 is to compensate persons for injuries caused by the deprivation of constitutional rights and should be governed by the principle of compensation. *Carey v. Piphus*, 435 *U.S.* 247, 98 *S.Ct.* 1042, 55 *L.Ed.*2d 252 (1978). Both compensatory and punitive damages are available upon proper proof. *Cunningham v. City of Overland*, 804 *F.2d* 1066 (8th Cir. 1986).

In *Cunningham*, the Board of Alderman denied the application of the plaintiff for a merchant's license to which the plaintiff was entitled. The State Court determined that the license had been wrongfully withheld. Plaintiff instituted suit in the U.S. District Court alleging a deprivation of his property rights in violation of §1983. The denial of the license resulted in a competitor purchasing the location with the resulting loss of the opportunity to operate its business at that location. A jury returned a verdict in favor of plaintiff for both compensatory and punitive damages against the municipality. On appeal, the 8th Circuit held that the denial of a building permit or a license to operate a business to which one is entitled on complying with the appropriate provisions of the ordinance constituted a deprivation of constitutional rights under §1983 and affirmed the award of compensatory damages, punitive damages and attorney's fees under §1983.

It is established in New Jersey that state law immunities do not protect municipalities and public employees from claims under §1983. *Hayes v. Mercer Cty.*, 217 *N.J. Super.* 614 (App. Div. 1987) *cert. denied* 108 *N.J.* 643.

The foregoing decisions establish the action of the defendant in depriving plaintiff of a Certificate of Occupancy to which it was entitled as a matter of course, in requiring a license under its Quarry License Ordinance which was *ultra vires* its authority and in the alternative in arbitrarily refusing to grant a license to which it was entitled as a matter of course constitutes a deprivation of its constitutional rights to operate its business under color of state law. Defendants are liable for compensatory and punitive damages and reasonable attorney's fees.

* * *

APPENDIX 5

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF
THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: SOMERSET COUNTY
DOCKET NO. W-27465-88 P.W.

BERNARDSVILLE QUARRY, INC., a New Jersey Corporation, Plaintiff,	:	
vs.	:	Civil Action
BOROUGH OF BERNARDSVILLE, a municipal corporation, et als., Defendants.	:	OPINION

DATED:

Clifford W. Starrett, Esquire for plaintiff
(Schenck, Price, Smith & King)

Dennis Alan Cipriano, Esquire for
defendant Borough of Bernardsville

Richard P. Cushing, Esquire for defendants
John Doe and Richard Roe

GUTERL, J.S.C.

* * *

b. The Depth Limitation

The provisions of the Quarry Licensing Ordinance which regulate the depth of the quarry are challenged by the plaintiff since they are the most limiting provisions of the entire ordinance:

> "3(e.) No quarrying shall be permitted which will reduce the quarried area below the lowest grade of adjoining properties, roads or railroad lines . . . "

When the quarrying plans of BQI are contrasted with these provisions, the scope of the limitation is clear. A description of the quarry is necessary to make this comparison. The quarry was carved out of a hill which had an elevation of approximately four hundred and fifty feet (450) above sea level. The top of this hill is still visible above the pit filled with water. The rock has been carved out to a depth of two hundred and twenty five (225) feet above sea level at the base of the pit which extends over an area of approximately fifteen (15) acres. There is a prominent cliff approximately ninety (90) feet in elevation (measured from the quarry floor outside the pit)

which extends about two thirds of the quarry length. Beneath that cliff, the largest area of the quarry slopes down to the railroad tracks which stand at the level of three hundred and fifty (350) feet above sea level, the floor established by the ordinance. BQI proposes to extend and deepen the quarry pit so that it extends over approximately forty five (45) acres and has a floor at seventy-five (75) feet above sea level. The stone would take twenty (20) years to remove and would create an approximately forty five (45) acre lake with a depth of over two hundred (200) feet throughout. The distance from the top of the quarry area (above the cliff) would be approximately three hundred and seventy five feet (375):

The establishment of a quarry floor elevation at the level of the railroad tracks would therefore substantially reduce the amount of stone which could be quarried. BQI's major effort in the trial was directed at showing the resulting financial impacts that the depth limitation would create.

Throughout the trial numerous witnesses testified to the costs incurred by BQI in the acquisition and clean up of the quarry. Expert witnesses for both parties testified to the value of the property. There was testimony about the reasonable business expectations of BQI and the feasibility of using the property for other purposes. Virtually every allegation of BQI was challenged by the Borough and every expert opinion offered was countered by an expert of similar reputation and experience.

BQI contended through all its witnesses that it had expended substantial money to acquire and clean up a quarry operation which was a valid nonconforming use.

It argues that it has every right to expect to profit from that investment. Enforcement of the depth limitations contained in the Ordinance would preclude any profit, or even a return of the original investment, according to BQI. Acknowledging its obligation to establish the unreasonableness of the Ordinance, it forcefully argues that the Borough has not outlined any of the environmental criteria for such regulation as were approved by the Court in *Dock Watch*, supra. The Borough offers substantial precedent to support its position that a municipality has the right to regulate activities of property owners to prevent harm to the public health, safety and welfare without compensating owners for any resulting reduction in value. According to the Borough, there need not even be a showing of a public health, safety or welfare concern where there is not a deprivation of all or substantially all use of the property and BQI must demonstrate such loss to prevail on this issue.

Substantial case law is cited by both parties and some reconciliation is necessary. BQI asserts that under Article I, Section 20 of the New Jersey Constitution, owners who have invested in improvements preceding any regulation or who have invested substantial amounts of money prior to regulations are provided protection of nonconforming use status and the New Jersey Constitution recognizes that the right to engage in a lawful business is a constitutional right. *N.J. Constitution*, Article 1, sect. 20; *Sheffield Farms Co. v. Seaman*, 114 N.J.L. 455, 461 (Sup. Ct. 1935): *New Jersey Used Car Trade Ass'n v. Magee*, 1 N.J. Super 371, 377 (Ch. Div. 1948); *Borden's Farm Prod. of New Jersey v. Board and Borough of Somerville*, 36 N.J. Super 104, 112 (Law Div. 1955). BQI further argues that regulation of a

business should not go beyond the demand of the public interest which vindicates its exercise. *Reingold v. Harper*, 6 N.J. 182, 191 (1951). It relies on *Sabato v. Sabato*, 135 N.J. Super 158 (App. Div. 1975) which held that passage of a regulation which deprives an owner of all or most of his interest in property amounts to a taking without just compensation. BQI claims that the effect of the prohibition on quarrying below the (350) feet deprives BQI of all or most of its interest in the property.

While BQI concedes that the statutory grant of police power to municipalities encompasses authority to enact regulatory ordinances for the protection of persons, safety and general welfare of the community, it argues that all police power legislation is subject to the constitutional limitation that it not be unreasonable, arbitrary or capricious in that the means selected shall have a real and substantial relation to the object sought to be obtained. *Bonito v. Mayor of Bloomfield*, 197 N.J. Super 390, 397 (Law Div. 1984); *Trombetta v. Mayor of Atlantic City*, 181 N.J. Super 203, 226 (Law Div. 1981), *aff'd per curiam*, 187 N.J. Super 351 (App. Div. 1982); *Gabe Collins Realty, Inc. v. Margate City*, 112 N.J. Super 341, 346-347 (App. Div. 1970). Where the subject of the ordinance is so prohibitory in its impact, the government is properly required to present evidence of a compelling public need in order to justify such a drastic measure. *Southland Corp. v. Township of Edison*, 217 N.J. Super 158, 177 (Law Div.), citing *Robinson v. Cahill*, 62 N.J. 473, 491-492 (1973). The standard used has been explained in Robinson at 492;

> "Ultimately a court must weigh the nature of the restraint or the denial against the apparent public justification and decide whether the State

> action is arbitrary. In that process, if the circumstances sensibly so require, the Court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial."

BQI argues that under that analysis, it is clear that the public interest to be served is insufficient to justify the drastic effects on BQI's business.

The Borough disputes BQI's conclusions and offers decisions which, it argues, rejects plaintiff's arguments. Property is held under the implied obligation that the owner's use of such property shall not be injurious to the community. *Mugler v. State of Kansas*, 123 U.S. 623, 665 (1887); *Keystone Bituminous Coal Association v. De Benedictis*, 480 U.S. 470 (1987). In *Keystone*, the Supreme Court held that a "state need not provide compensation when it diminishes or destroys the value of property by abating a public nuisance." Where a particular use is deemed injurious to the public welfare, its prohibition-even if such prohibition results in substantial reduction in the property's market value-does not constitute a taking. *Shonkwiler & Morgan, Land Use Litigation vol. I*, 176 (1986). In *Hadacheck v. Sebastion*, 239 U.S. 394 (1915), an ordinance to prohibit detrimental effects of property use was upheld even though the property's value was reduced from $800,000 to $60,000.

In *Goldblatt v. Town of Hempstead*, New York, 369 U.S. 590 (1962), the Supreme Court focused upon an ordinance that prohibited a beneficial use to which the property had previously been used:

> It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional. . . .
>
> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot,. . . . be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests." *Id.* 369 U.S. at 592-593.

Even where nuisance or potential nuisance is not found, regulations under the police power have been upheld even though it has resulted in severe diminution in value of the subject property. In *William C. Haas v. City and County of San Francisco*, 605 F2d 1117, 1120 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980), a regulation was upheld which reduced the property value from $2,000,000 to $100,000. In *Orleans Builders and Developers v. Byrne*, 186 N.J. Super 432, 446 (App. Div. 1982) the court recognized that "a property owner is barred from any claim to a right of inverse condemnation unless deprived of all or substantially all of the beneficial use of the totality of his property as the result of excessive police power regulation."

In *Albano v. Mayor & Tp Committee of the Twp. of Washington*, 194 N.J. Super 265 (App. Div. 1984), the court addressed the issue of whether the rezoning of property

from one acre minimum residential to three acre minimum residential constituted a taking without compensation. The ordinance was enacted to prevent further pollution of a lake into which a number of streams on the plaintiff's property fed. The plaintiffs contended that the regulation would prevent them from recouping their investment and that it denied them reasonable use of their property. The Appellate Division upheld the ordinance thereby rejecting the claim that the plaintiff could not profit from the property. "If a zoning ordinance could be invalidated simply because a developer could not make a profit under its terms, then by paying an unreasonably high price he could force a municipality to adopt a zoning ordinance permitting unsound development of its property." *Albano* at 277.

The Borough cites recent New Jersey cases in support of its' [sic] argument that appropriate police power regulations were enacted here. In *Sands Point Harbor v. Sullivan*, 136 N.J. Super. 436 (App. Div. 1975), the Court upheld the Wetlands Act Of 1970, *N.J.S.A.* 13:9A-1 *et. seq.*, which regulated the uses of marshes and wetlands having environmental and ecological importance. The Court found that the property owner failed to demonstrate that the effect of the act would prevent all reasonable use of its property.

In *American Dredging Co. v. State*, 161 N.J. Super 504 (Ch. Div. 1978), the Court upheld an order of the Wetlands Act which resulted in the value of the subject eighty (80) acre tract being reduced from $10,000 to $1,000 per acre. The Court observed that the "mere diminution in economic value caused by the governmental restriction on the free use of land has not mandated a

determination of taking as an excessive use of the police power." *Id.* at 508.

Finally in *Dock Watch Hollow Quarry Pit v. Tp. of Warren,* 142 N.J.Super 103 (App. Div. 1976) which addressed the challenge to a quarry ordinance, the court held:

> "Nonconforming uses are clearly subject to such police power regulations, including those designed for the preservation of the environment and the protection of ecological values. *Id.* at 117.

Addressing an area of particular concern in the present case, the Court talked about the regulation of the quarry depth:

> "While we recognize that the prohibition against quarrying below grade will limit substantially the amount of material that Dock Watch may extract from its land, the welfare of the community should not be sacrificed for the purpose of permitting Dock Watch the most profitable use of that land." *Dock Watch* at 125.

Dock Watch upheld the right of a municipality to utilize its police power to regulate the depth at which a pre-existing quarry could excavate even where the quarry would be deprived of the right to excavate twenty-six million ($26,000,000) dollars worth of trap rock resources and the property had no reasonable use other than stone quarrying.

As noted, much of the testimony in this case dealt with the financial impact of the depth limiting provisions of the Quarry Licensing Ordinance upon BQI. The purchase of the quarry for three million eight hundred

twenty-five thousand ($3,825,000) dollars is undisputed. The additional costs of site cleanup cannot be determined precisely, but they were substantial, amounting to several millions of dollars. Gary Mahan, President of BQI, estimated expenses in excess of nine million ($9,000,000) dollars at the time of trial for the purchase, the clean up and repair of equipment. His testimony was not seriously disputed. With the exception of the location of asbestos on the property, all the problems on the site were known to BQI at the time of the purchase.

Several experts testified to the value of the property. BQI's expert on real estate valuation, Kenneth Jones, testified to a value of over thirty-four million dollars ($34,000,000) when the property is appraised as a quarry and only two million seven hundred thousand dollars ($2,700,000) when appraised as vacant land. The Borough's expert, Louis Eisenberg, testified to a lower value, approximately eight million dollars ($8,000,000) when the property is appraised as a quarry and six million eight hundred thousand dollars ($6,800,00) [sic] when appraised as vacant land. Jones contended that residential use would be the only feasible use of the property if the quarry was forced to discontinue operation, but Eisenberg believed a commercial use would offer the best and most profitable alternative. Regardless of the valuation used, BQI is not likely to recover its investment and a reasonable return thereon unless it is allowed to resume full scale quarrying on the site without the depth limitations contained in the ordinance. I find the testimony supports a valuation substantially in excess of the eight million dollars ($8,000,000) testified to by Louis Eisenberg when the property is used as a quarry without the depth

limitations. I further find the value of the property as commercial property to be substantially more than the two million seven hundred thousand dollar ($2,700,000) estimate of Kenneth Jones. An exact value need not be determined to consider the precedent argued by both sides. I find the depth limitations will cause a substantial loss to BQI if allowed to stand. I also find that the property would under the circumstances still have other viable uses and would retain substantial value, although with little potential of BQI recovering its investment of nine million (9,000,000) dollars.

The suggestion that the property should be used for offices seems overly optimistic upon first consideration, but I find the presentation by Philip Caton, the planning expert produced by the Borough, to be convincing and plausible, although all the potential development problems were not explored. The evidence established office use to be a viable practical use. In addition, while all alternative uses are speculative to a degree, there are other facilities on the property which were in operation after the cessation of quarrying in the past and were allowed to resume before the institution of this lawsuit. Despite testimony to the contrary from BQI officials, the blacktop and concrete facilities are apparently profitable even without the quarrying operations as evidenced by the fact that both the Ferrante family and BQI have seen fit to continue these other operations on the property even without active quarrying. The presence of a telephonic transmission tower is also the source of significant revenue.

BQI has the burden to show an absence of justification for the depth limitation provisions of the Quarry Licensing Ordinance. *Dock Watch Hollow Quarry Pit v. Tp. of Warren*, 142 N.J. Super. at 116, citing *Rudderow v. Mt. Laurel Twp. Committee*, 121 N.J. Super. 409, 415 (App. Div. 1972). That alleged justification is mostly environmental, dealing with the safety of the proposed enlarged quarry pit to people using the property as well as potential health hazards to the local water supply. Some justification is found in *Dock Watch:* "It is obvious, and the record amply demonstrates, that if Dock Watch were permitted to quarry below grade 'to an unlimited depth' a crater will be left when its operation is eventually abandoned. The hazards and dangers attendant such condition on the land are well known and of considerable concern. If the crater eventually fills with water, as it undoubtedly will, it will cause environmental damage such as pollution of the underground water supply and adjoining streams". *Id.* at 125. Because those "hazards and dangers" were found to be "well known" in *Dock Watch* they should not be treated lightly here. Several of the Borough's witnesses testified to the potential for drowning due to the absence of a gradual slope beneath the water. Parenthetically, it should be noted that although it is not important in resolving this case, it seems to the court that a forty five (45) degree slope as required in the ordinance would preclude even an experienced swimmer from climbing out of the pit. That danger would be lessened if the pond were not enlarged and commercial or industrial development on the property was encouraged, according to Philip Caton. Concern for pollution would likewise be lessened if enlargement of the pond was prohibited according to the testimony of the Borough's expert

DiMicco, who described at length the increased danger from the proposed enlargement of the quarry pit. According to DiMicco, the expert reports submitted by BQI are not sufficient to resolve all questions of potential water pollution. He also saw some potential of surface pollution through careless deposits of oil or other pollutants during quarry operations, which the witness admitted to being similar to the risk in common parking lots. The evidence did establish a potential connection between water in the quarry and water in the subterranean aquifers. Most importantly, the evidence did establish a substantial exposure of the acquifier [sic] to potential pollutants which could occur in the proposed forty five (45) acre pond. Although the pond in the quarry is not presently polluted, the substantial enlargement of the pit will carry the penetration into the acquifier [sic] to a depth one hundred and fifty (150) feet deeper over an area approximately three times as large. This will substantially increase the potential for contamination of the acquifer. Although BQI did demonstrate the absence of any on site source of pollutants, this risk should not be minimized particularly in view of the fact that we have much to learn about our environment.

There was, for example, testimony about the potentiality of pollution from the remnants of the illegal landfill and the transfer station which were present on the property prior to BQI's acquisition. Neither the existence nor the absence of toxic substances from these sources was proven. The testimony did demonstrate the scope of BQI efforts to clean up problems and these efforts were laudable. The testimony makes it absolutely certain that

the potential for pollution of the water in the quarry pit has lessened greatly because of BQI's clean-up efforts.

There are other problems that were considered by the Borough in determining the limitation of quarry depth. The Borough has expressed concern about the effect of the enlarged quarry pit upon the safety and welfare of its citizens as well as the economic future of the community. The Borough contends that the forty-five (45) acre lake with an average depth of two hundred and twenty five (225) feet bordered in large part by ninety (90) foot cliffs, will be difficult to police and will constitute an attractive nuisance. The Court in *Dock Watch, supra,* saw such a hole as hazardous it [sic] and of itself, lending support to the Borough's position.

The Borough also contends that such a substantial and irreversible change to this property will harm its economic future since future commercial development of the property would be impossible. The condition of the property and its close proximity to the commercial area of the Borough make it highly suitable for such development, according to Philip Caton.

The provisions of the Quarry Licensing Ordinance are virtually the same as the ordinance that was challenged in *Dock Watch, supra.* However, the fact situtation here is somewhat different. In *Dock Watch* the quarry owner would still have substantial reserves left above the floor imposed by the ordinance while here that is clearly not the case. BQI contends that fact makes the *Dock Watch* decision distinguishable. While the effect on the quarry owner here may be different than it was in the *Dock Watch* case, the Borough's concerns are no less compelling. The

Borough's right to enact laws it deems necessary to protect the health and well being of its citizens is firmly based. The Borough is not required to prove the existence of a current environmental problem at the quarry nor even that such a problem is likely to occur. The Court's function is different, however. The Court is not a super legislature and must not substitute its judgment for that of the governing body. The question for the Court to decide is whether there is evidence of a compelling public need to justify the actions of the Borough. *Southland Corp v. Township of Edison, supra.* The Court in *Dock Watch* found such a compelling need under almost identical circumstances. Even when contrasted to the onerous restraint against BQI, I find the Borough's action to be reasonable. The scope of the proposed quarrying is mammoth. Even in its present appearance, the quarry looks like the scene from a distant planet. Few communities are ever confronted with the need to deal with a use of its property involving such extreme violence to the topography. The divergence of opinion by so many experts, all of whom were passionate in the defense of their positions, demonstrates the inability of a governing body to predict with certainty the effect of the removal of so much stone. Under the circumstances, I find the Borough has demonstrated "the existence of a sufficient public need to justify the depth limitation provisions of the Quarry Licensing Ordinance. *Robinson v. Cahill, supra,* 62 N.J. at 492.

APPENDIX 6

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BERNARDSVILLE QUARRY, Plaintiff,	:	CASE NO: CV 88-2427
v.	:	402 East State Street P.O. Box 515
BOROUGH OF BERNARDSVILLE, Defendant.	:	Trenton, New Jersey 08603
	:	January 17, 1989

TRANSCRIPT OF HEARING
BEFORE HONORABLE GARRETT E. BROWN, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	Schenck, Price, Smith, & King By: CLIFFORD W. STARRETT, ESQUIRE 10 Washington Street Morristown, New Jersey 07960
For the Defendant:	Gebhardt & Kiefer By: RICHARD P. CUSHING, ESQUIRE 21 Main Street Clinton, New Jersey 08809
	DENNIS A. CIPRIANO, ESQUIRE 200 Executive Drive Brielle, New Jersey 08730
Audio Operator:	Bill Carothers

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

J & J COURT TRANSCRIBERS
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* * *

THE COURT: Very well.

MR. CUSHING: Judge, very basically on the merits, our brief obviously covers extensively the abstention question, and I'm certainly not going to repeat that area extensively.

Largely replying to the plaintiff's brief and opposition, plaintiff's claim basically in this case is that the Federal action and the State action are two separate actions, that they can be tried independently of each other without any relationship to each other.

Our argument, Judge, essentially is that the Federal action is a – I think we used the phrase diminutive subset, and I think that accurately describes the Federal action.

And in reviewing last night the submission of the plaintiff in opposition, I went through the pleadings that were submitted in this case in both the State Court and the Federal Court, and they are attached to our original moving papers. The State Court complaint is set forth in DB2 through 19, and the Federal cause of –

THE COURT: Yes, Count 1 of the Federal complaint is similar to Count 2 of the State complaint, except Count 2 of the State complaint asserts a violation of New Jersey constitutional law rather than Federal law, and Count 5 of the State complaint is identical to Count 2 of the Federal complaint except there is there a reference to both Federal and State constitutional law, is that correct?

MR. CUSHING: They're not just identical, Judge. They're word for word, even to the extent of a typo in Paragraph 11 that appears in both complaints. They're obviously pleading by word processor here, and there's nothing wrong with that, but it highlights –

THE COURT: And they're relying on a Federal Statute, section 1983, on the 2nd Count of the Federal complaint, and the 5th Count of the State complaint, correct?

MR. CUSHING: That's exactly correct, your Honor. And that is the point.

THE COURT: That being the case, does that mean that I must abstain? I mean, there may be some interests of judicial economy, but the entire body of jurisprudence that is grown up on the subject of abstention, counsels against abstention, except in the extraordinary case. And the mere fact that there are two parallel actions proceeding is not dispositive of the question of abstention, is it?

MR. CUSHING: It's not dispositive. It's certainly within the discretion of this Court. However, your Honor, it makes a lot of sense to do it in this particular

case. As you indicated, they are exactly the same causes of action.

Secondly, in order to prove both causes of action, the proofs are going to be precisely the same. In the State Court action, the discovery is proceeding. All discovery from the State Court action is going to be used in the Federal Court action pursuant to agreement between the parties. There has been a submission of an appraisal in the State Court action, which will be also be used in the Federal Court action.

Essentially, Judge, as I read the cases on abstention here, this is a garden variety. We say, a garden variety land use case, and I think the Federal cases have generally said when it's a garden variety of land use case, there's no reason to have two cases proceeding along separately for two separate trials, particularly in this case, where there are many questions that involve State law. There is the application of the land use law. That's a very important application in both situations. There's applications of ECRA, The Environmental Clean-up Responsibility Act, and its application to this particular case.

There are – and they are related to the Federal Court action. They're not separate from the Federal Court action. One of the arguments made in the Federal Court and in the State Court having to do with why this property should not be mined any more extensively than it has been, is because there is substantial environmental deterioration to this property by virtue of past actions on the property, and the nature of the rock on the property is known as a fractured type of rock where the problems are

that there will be transmission of pollutants throughout the sub – the area below the ground.

Accordingly, your Honor, it makes abundance [sic] sense in this particular case to try the case in the State Court, and for the Federal Court to abstain. In the event that at some point in time it's determined that not all the Federal Questions have been adequately, or sufficiently resolved, in the State Court action, then the Federal Court has the option at that point in time to turn around and say, okay, well, we'll pick up where the State Court left off, for whatever it left out.

But that way it allows a judicial economy here without the expense and necessity of having two different actions. The cases cited by the plaintiff, or [sic] all cases where there were special reasons that took the cases out of the garden variety land use case. They cite the *Izzo v. West Orange* case. The difference in that case there was that there was a situation where the Federal pre-emption of the FCC having to do with TV antennas, and radio antennas came into play, and the Federal Court said, okay, this takes it out of the garden variety of land use case.

The *Heritage Farms* case, the Pennsylvania case, was one where there were unique circumstances having to do with outrageous conduct by Municipal Officials who were not seeking to carry forward the important public interest, but were seeking to carry forward personal interests. They were seeking to line their own pocket, and seeking to damage the particular plaintiff in that case.

Again, the Court in that case, emphasized that the reason that abstention would not be granted there, was

because it stepped outside the garden variety of land use case.

THE COURT: Well, is there authority that says in the garden variety land use case, I must abstain?

MR. CUSHING: No, I don't think the Court – I don't think the law is such, Judge, that says you absolutely must abstain. But the law – the suggestion, I think, strongly in the case is if it makes sense to abstain.

THE COURT: What is the status of the State Court action? Has it been pretried?

MR. CUSHING: It's been pretried. It was pretried back in, I believe, September, your Honor.

THE COURT: It's an action in lieu of prerogative writ?

MR. CUSHING: Yes, that's correct, Judge.

THE COURT: When is it scheduled for trial?

MR. CUSHING: It is scheduled probably February or March, Judge. I don't know for sure if it's going to be reached at that time. It's obviously dependent on the State Court calendar.

THE COURT: Now, your action here has not been pretried, correct?

MR. CUSHING: That's right. It's scheduled to be pretried in March, your Honor.

There's one final point, Judge, which is this: It's very expensive to litigate two cases at one time for the taxpayers of the Borough of Bernardsville. Now, I know that

the Court obviously is not bound by that, and can choose, because of the important Federal rights, to allow that to proceed ahead, but in this case, we have a very wealthy plaintiff who has chosen to institute two parallel actions, one of which contains the exact same claims that are contained in the State Court action. The taxpayers of the Borough of Bernardsville should not be subjected to parallel expensive litigation to force them to change decisions that they've made with respect to their land use policy. This Court, well, perhaps it's not mandated to do so, certainly should defer and allow the State Court action to proceed ahead, allow that action to be completed, and then if plaintiff feels that there's something that wasn't adequately and fairly dealt with in the State Court action, he can come back to your Honor and try to convince your Honor that in that point in time, there should be additional actions in the Federal Court. Thank you, Judge.

THE COURT: Mr. Starrett –

MR. STARRETT: Yes, sir.

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